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## STATEMENT

Involved in this proceeding is the question of the existence in the State of Oregon of a right, because of ownership of land riparian to a non-navigable stream, to have the flow of the stream, without material impairment in quantity or quality, without use and without submitting the claimed right to an adjudication of the relative rights to the use of the waters of the stream held in conformity to Oregon laws, despite legislation limiting riparian rights to the amount of water put to a beneficial use at the time of the legislation (1909).

Rogue River, the use of the waters of which is the bone of contention, rises at an altitude of about 5,000 feet on the western slope of the Cascade Mountains in Oregon, near Crater Lake, and flows southwesterly to the Pacific Ocean. Its drainage area is approximately 5,000 square miles; its length is approximately 210 miles. (*Appendix 44.*) The mountains in which the river rises are rough, wooded, and the annual precipitation there is 50 to 75 inches. After leaving the Cascade Mountains the river flows through one of the semi-arid, but with irrigation richly productive, valleys of the state (Rogue River Valley); thence through the Coast Range of mountains to the ocean. In both ranges of mountains the Rogue River provides excellent power sites because of the rugged country and heavy fall of the water. The mountainous districts through which the stream flows are rich in minerals and the waters of the stream are used for mining purposes. Rogue River Valley is one of the famous fruit producing districts of the state, the Valley being particularly noted for its pears. Precipitation in the Valley is low, and irrigation is necessary for satisfactory production. At its mouth Rogue River is wide, of fair

depth and navigable for power boats. Along the course of the stream are pleasure resorts where riparian owners rent the privilege of bathing, boating and fishing. The stream is the famous habitat of the sporty Steelhead. Thus the stream presents, in the purposes for which its waters may be used, practically every beneficial use of water. Likewise it presents variations in climatic conditions. Near its mouth, west of the Coast Range of mountains, the climate has the moisture that goes with the ocean littoral of Oregon. Through the rich agricultural district of the Rogue River Valley the land is semi-arid and requires irrigation, while in the Cascade Mountains where the river has its rise there is again heavy precipitation.

Petitioner is the owner of Lots 1 and 2, Section 15, Township 36 South of Range 3 West of the Willamette Meridian, in Jackson County, Oregon. The land is riparian to Rogue River. It was patented by the United States to Francis Marion Friedenburg April 20, 1885. Through mesne conveyance, petitioner became the owner thereof March 11, 1921 (*R. 67*). Respondent, City of Gold Hill, is the owner of Lots 5, 6, 7 and 8, in the same section (*R. 67*) and is under executory contract to respondent, Beaver-Portland Cement Company, to convey said land and water rights appurtenant thereto (*R. 69*). The terms of the executory contract provide that the City of Gold Hill shall be paid the sum of $22,600 to retire bonds which it issued in payment of the purchase price of said property from its predecessors, and shall receive from Beaver-Portland Cement Company in the city mains water for municipal purposes pumped with a power plant to be constructed by the Cement Company, and shall receive power for municipal use (*R. 42-44*).

The lands of petitioner and respondents are directly opposite each other on the river, the former on the

easterly bank, the latter on the westerly bank. Predecessors in interest of respondents had constructed a small power development which the City purchased.

In 1919, as the result of an adjudication of the relative rights to the use of the waters of Rogue River, a decree was entered adjudicating to predecessors in interest of respondent, City of Gold Hill, the use of 270 cubic feet per second of water for power purposes (*R. 68*), and thereafter the City of Gold Hill applied to the State Engineer for and received a permit to appropriate additional water to the amount of 1,127 c.f.s. (*R. 69*). This total of 1,397 c.f.s. is under contract to respondent, Beaver-Portland Cement Company.

The first claim that the lands of petitioner were valued as a power site was made by a predecessor in interest, Condon Water & Power Co., in 1906 (*R. 71*). That predecessor never made any use of the water (*R. 72*). California-Oregon Power Company was the immediate predecessor of petitioner, *The* California-Oregon Power Company (*R. 70*). Petitioner was organized in 1920 (*R. 188*). No use of the water has ever been made by the petitioner herein or its predecessors, nor did petitioner's predecessors request an adjudication of a right to use the waters of Rogue River at this point when the relative rights to the use of the waters of this stream were adjudicated under the Oregon law, although the immediate predecessor in interest of petitioner was a party to the adjudication, claimed water at another location on Rogue River about three miles above the location presently involved, and was decreed a right by appropriation at the upper location (*R. 70*).

In 1928, acting under the above mentioned executory contract between the two respondents here, respondent Beaver-Portland Cement Company began the construc-

tion of a wing dam in Rogue River, and the petitioner here brought suit in the federal court to enjoin the construction (*R. 391*). This litigation resulted in a decree (*R. 473*) pursuant to a decision of the Ninth Circuit Court of Appeals (35 F. (2d) 317) affirming the right of respondents to maintain a crib 10 feet wide and 80 feet long on Lot 1 of Petitioner's property, and specifically reserved the question of water rights for future consideration.

On July 21, 1930, pursuing the construction of its diversion works for the development of power, respondent Beaver-Portland Cement Company discharged some shots to remove obstructing reefs on its own, or westerly, side of Rogue River (*R. 72*), when the present suit was filed and restraining order issued. This work was entirely on respondents' own, or westerly, side of the stream, and did not remove any lateral support from the property of petitioner, nor damage petitioner's property in any manner (*R. 73*).

In its decree the trial court carefully preserved petitioner's natural rights as a riparian owner to have sufficient water flow across its land for domestic and stock purposes and garden irrigation (*R. 74*), but held that petitioner did not have further rights to the use of the waters of Rogue River at this location.

In its appeal petitioner assigned errors referring only to the court's legal conclusions from its findings of fact, and did not question those findings (*R. 83*). The Circuit Court of Appeals accepted the findings of the lower court, but based its conclusion upon different reasoning than that employed by the trial court (*R. 411*).

In this state of the record we understand this court accepts the findings approved by two courts: *Boehmer v. Pennsylvania R.R. Co.* 252 U.S. 496, 64 L. ed. 680

(1919); *United States v. State Investment Co.*, 264 U.S. 206, 68 L. ed. 639 (1923); *Bodkin v. Edwards*, 255 U.S. 221, 65 L. ed. 595 (1920); *Washington Securities Co. v. United States*, 234 U.S. 76, 58 L. ed. 1220 (1913).

Petitioner suggests rather heatedly that respondents are believers in violence, and resort to dynamite instead of the courts. Respondents feel quite clear on the record. Petitioner's predecessor was party to a general adjudication of the relative rights to use the waters of Rogue River, and claimed no right at the location of petitioner's land. An early litigation had upheld the right of respondent's predecessor to build a dam to a pier on petitioner's land, but denied the right to cross the entire watercourse with the dam. The Circuit Court of Appeals decided that the right to maintain the pier continued but that the right to build to it on petitioner's land had been lost (35 F. (2d) 317) and on December 29, 1929, pursuant thereto the trial court entered its decree (*R. 176*). Respondent, proceeding in accordance with Oregon law, acquired the right to construct a power plant and a permit to use the water of Rogue River to develop the power. Perfection of this permit required diversion of the water. This was undertaken entirely on respondent's land. Petitioner, who had claimed no water right at the adjudication, is not in a position to assert that respondent should have sued petitioner for *another* water adjudication before beginning construction. The opinion of the Court of Appeals was interpreted as suggesting that if petitioner claimed a water right it should assert that right through the state's adjudication machinery (*R. 63*), and ample time was given petitioner to apply for such adjudication before respondent began constructing its diversion channel.

We have printed as an appendix to this brief material which we deem pertinent and which is not included in the appendix to petitioner's brief. We have avoided duplication and will refer to the appendix to petitioner's brief for matters printed therein.

### Oregon Court Exercised Good Faith

Preliminary to presenting our summary and brief we suggest a lack of warrant for the charge of bad faith against the Oregon Supreme Court which seems to be a theme running through petitioner's brief. The contention is offered that a sort of a conspiracy existed in the Oregon court to (1) mislead the Supreme Court of the United States into approving the Oregon water code, and (2) lull all owners of land riparian to the streams in Oregon into a sense of safety as to unused but claimed rights (*See Pet. Brief, pp. 27, 28, 108-109, 331*). While the Supreme Court of Oregon probably needs no defense at our hands, we express the view that all courts are inherently honest and that no court could work out a plan throughout the years, with the changing membership of the court, such as is suggested. If so, the Oregon court has done an enormous wrong, because many of the streams of the State of Oregon have been adjudicated, the acreages of irrigated land alone exceeding one million, of which over 34,000 are supplied with water from Rogue River. (*Appendix, p. 48*). Petitioner's argument is based entirely upon a misconception of the opinion of the Supreme Court of Oregon in the case of *In re Willow Creek*, 74 Or. 592, 144 Pac. 505, 146 Pac. 475 (1915). The argument repeated and reiterated in petitioner's brief is that in this case the Supreme Court affirmed all of the claimed common law riparian rights and never thought of construing the water code to limit

those rights to the water that had been theretofore put to a beneficial use or was in process of being put to a beneficial use at the time the water code was enacted in 1909. From this erroneous conclusion is built up the argument that the court continued to rule that the idle water theory should prevail in Oregon until the decision in the Hood River case in 1924, and that because of this, which petitioner calls "assurances" to the Supreme Court of the United States, that court was induced to approve the water code in the case of *Pacific Livestock Co. v. Lewis,* 241 U.S. 440, 60 L. ed. 1084 (1916). We credit this court with reading the case of *In re Willow Creek, supra,* more carefully than did petitioner. In that case it clearly appeared that the Eastern Oregon Land Company claimed as a riparian owner water for 7,000 acres of land. We quote from page 608 of 74 Oregon:

> "This company is a California corporation and the owner of a large amount of land in the watershed of Willow Creek, a description of which is set out in this appellant's claim. The main channel of Willow Creek passes through about 7,000 acres of these lands particularly described in the record, all of which the Eastern Oregon Land Company alleges to be riparian to the stream."

Thereafter follows a discussion of all of the facts that constitute riparian ownership, an extensive review of the decisions in the State of Oregon and from other states with reference to water rights based upon claims of various character; then it is pointed out that the Eastern Oregon Land Company claimed by appropriation for 216.5 acres (74 Ore., p. 609), and then the court allowed on the claim for its 7,000 acres based upon a riparian right just 292.02 acres on which the

water had actually been used (74 Ore., p. 621). In this state that was an historic decision because it, for the first time, applied the water code of 1909 actually limiting a riparian right to the amount of water that had been put to a beneficial use before enactment of the code. That may be justification for the lengthy discussion of the development of water law in Oregon which appears in that case. We submit, however, that the *point decided* is the controlling thing and not the kind or length of discussion, and the point decided was that the Eastern Oregon Land Company's riparian claim would be limited to the amount of water put to beneficial use. So, instead of the Supreme Court of Oregon undertaking to mislead the world as to what it proposed to do some years later, it did at the first opportunity apply the Oregon water code just as it later applied it in the Hood River case.

## SUMMARY

I. A riparian owner may not ignore an adjudication of the relative rights to the use of the waters of a stream under the Oregon practice and then at a later date assert a right antedating the adjudication.

It is not a question of *res adjudicata*, but a question of the method of asserting a water right where the rights to the use of the waters of a stream have been adjudicated.

The proceeding is *in rem*, and a single claimant on a stream must claim all of his rights either as an appropriator or as a riparian owner. Petitioner's predecessor claimed and was awarded a right by appropriation and did not claim and was not in a position to claim a riparian right.

**II. The common law doctrine that the owner of riparian land may insist that the waters of the stream flow by his land unused by himself and to the exclusion of use by others has never been adopted in Oregon. Neither the legislative nor the judicial history of the State of Oregon will sustain the contention that the policy of this state has built up a rule of property sustaining the idle water doctrine.**

The common law doctrine of riparian rights and the doctrine of non-riparian use are so opposed that the adoption of the latter is an immediate departure from the former. The State of Oregon early adopted laws for the appropriation of water and never, prior to patent from the United States to petitioner's predecessor in interest, did the Supreme Court of Oregon determine that the common law of riparian rights should be the rule in this state. After the issuance of patent to petitioner's predecessor, the water law of Oregon was in a state of flux until the Water Code of 1909 definitely limited water rights to such as had been put to a beneficial use prior to its enactment, or to such as might be thereafter acquired in conformity with the provisions of the Code. At all times beneficial use has been the measure of right and never has the court as a litigated question sustained the doctrine of continuous flow without use. Prior to March 11, 1921, when petitioner acquired its land, there was neither court decision nor legislation in Oregon to justify the contention that a rule of property had been established upon which petitioner could rely.

**III. The Desert Land Act, passed March 3, 1877, by reserving for appropriation all waters of non-navigable lakes and streams upon all PUBLIC LANDS, put an end to riparian claims to water flowing through lands patented after the date of the act.**

**IV. The Oregon Water Code of 1909 did not deny to petitioner equal protection of the law or take its property without due process of law.**

(1) The act carefully preserves any water right initiated prior to its enactment. To classify riparian owners into those who had put water to a beneficial use, those who had claimed a right under any prior existing laws, and those who are merely riparian to the stream but have done nothing toward use of the water, was a reasonable classification to bring about development for the general public good.

(2) The Constitution of Oregon, carrying forward laws in force in the territory until such laws should be altered or repealed, did not make a part of the law of Oregon the idle water theory of the common law and did *reserve* the right to withdraw the privilege of using water where that privilege had not been exercised before the withdrawal. In short, there could be no vested right under this constitutional provision until the water had been put to a beneficial use.

**V. Without a vested water right and with no damage to its side of the stream by the operations of respondent, and with a decree requiring respondent to always maintain the water at a level that will supply water on petitioner's side of the stream, petitioner has shown no damage that would justify injunctive relief.**

## I.

### A RIPARIAN OWNER MAY NOT IGNORE AN ADJUDICATION OF THE RELATIVE RIGHTS TO THE USE OF THE WATERS OF A STREAM UNDER THE OREGON PRACTICE AND THEN AT A LATER DATE ASSERT A RIGHT ANTEDATING THE ADJUDICATION.

After an adjudication each claimant to the use of water must claim either through the adjudication or upon a permit from the State Engineer subsequent to the adjudication. The Oregon Water Code of 1909 provides in Sections 33 and 34 (*Appendix to petitioner's brief, pp. 13-14*), that when the State Engineer has ordered an adjudication of the waters of a stream and that adjudication has proceeded to the final order determining relative rights of the various claimants, it shall be conclusive of "all prior rights and the rights of all existing claimants"; also that it shall be the duty of all persons interested in the waters of a stream to submit proof of their respective claims at the adjudication, and "any such claimant who shall fail to appear in such proceeding and submit proof of his claims shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in such proceeding, and shall be held to have forfeited all rights to the use of said water theretofore claimed by him."

There was an adjudication of the relative rights of all claimants to the use of the waters of Rogue River (*R. 68*) and the owner of the land now claimed by petitioner did not request that a water right at this location be adjudicated to such owner (*R. 70*). The constitutionality of this method of determining water rights, and particularly of the provisions of the Oregon Water Code above referred to, was upheld by this court in the case of *Pacific Livestock Co. v. Lewis*, 241 U.S. 440, 60 L. ed. 1084 (1916). The Supreme Court of Oregon has repeatedly construed the Oregon Water

Code to require all claimants to assert their rights at an adjudication and to bar any right antedating the adjudication not claimed therein .(*Pacific Livestock Co. v. Cochran,* 73 Or. 417, 428, 144 Pac. 668 (1914); *In re Waters of Chewaucan River,* 89 Or. 659, 680, 171 Pac. 402, 175 Pac. 421 (1918); *In re Willow Creek,* 119 Or. 155, 184, 237 Pac. 682 (1925).

We submit that under this construction of the Oregon Code when an adjudication is once found to have been held, no water claimant can assert a right, riparian or otherwise, except through the adjudication or based upon a permit issued by the State Engineer after the date of the adjudication, in accordance with the Water Code.

It is not a question of *res adjudicata,* it is a question of the force of the statute in limiting water rights, or the manner of establishing or asserting water rights, and we say it was competent for the legislature to so prescribe the manner in which a water right must be established. Any other rule would be destructive of the efficacy of the Water Code. It is to determine *relative* rights. If any claimant can ignore the adjudication and thereafter claim rights antedating the adjudication, the purpose of the adjudication is destroyed. The right of the state to require that all claimants submit their claims has been upheld in other states than Oregon and specifically applied to rights that were claimed to have been initiated long prior to the adjudication: *Humboldt Land & Cattle Co. v. Allen,* 14 F. (2d) 650, 654, 274 U.S. 711, 71 L. ed. 1314 (1927); *O'Neil v. Northern Colorado Irrigation Co.,* 242 U.S. 20, 61 L. ed. 123, 129 (1916). To compel each claimant to assert his right through the adjudication does not in any way impair his right, does not impose heavy burdens, and is a fair regulation imposed upon all water claimants alike.

**The proceeding is in rem.**

It was suggested in the dissenting opinion of Judge Wilbur that petitioner claimed it was not a party to the adjudication. In so far as petitioner was organized as a corporation in 1920 (*R. 188*), and the adjudication reached decree in the Circuit Court in 1919 (*R. 68*), it is quite clear that the petitioner, by name, could not have been a party to the adjudication. It is just as clear, however, that the predecessor in interest of petitioner was a party to the adjudication. We do not know why the corporation which was called California-Oregon Power Company prior to 1920 became *The* California-Oregon Power Company in the year 1920. We do know, however, that the former was the immediate predecessor of the latter (*R. 70*) and that California-Oregon Power Company was a party to this adjudication, and was awarded a water right. The proceeding is in rem (*Abel v. Mack*, 131 Or. 586, 594, 283 Pac. 8 (1929). Both the riparian land and the owner of it, as predecessor in interest of petioner, were respectively involved in and a party to the adjudication. Undoubtedly the adjudication would bind those who succeed to the interests of parties to the adjudication, and we say also as to those who purchase land which was subject to the adjudication, its effect could not be destroyed by the mere process of purchasing property after the adjudication from one who declined to present a claim for water at the adjudication. If this could be done there would be an endless process that would prevent an adjudication ever being final as to the *relative* rights of the users of the waters of the stream.

**Petitioner's predecessor could not claim as a riparian owner at this location.**

A further reason is found in the Oregon practice why a riparian right can not be asserted at the location of petitioner's land in the present proceeding. Whether wise or not, it is the established rule in Oregon that a claimant to the use of the waters of a stream must base his right either upon claims by appropriation or claims based upon the riparian location of his land and the application of the water to a beneficial use: *Williams v. Altnow*, 51 Or. 275, 300, 95 Pac. 200, 97 Pac. 539 (1908); *Cavincss v. LaGrande*, 60 Or. 410, 421, 119 Pac. 731 (1911). The court has construed this rule to permit different claimants upon the same stream to assert rights of a different nature but have insisted that the same claimant must assert all rights either by appropriation or by riparian ownership. California-Oregon Power Company, the immediate predecessor of petitioner, asserted and was adjudicated a right by appropriation to the use of the waters of Rogue River in developing power at a point three miles above the location presently involved (*R. 70*). Having thus asserted a right by appropriation in the same location, that predecessor waived claims to the use of the waters of the same stream by virtue of riparian ownership. Confronted with this necessity of election under the water doctrine enforced by the Supreme Court of Oregon, the predecessor doubtless elected the more certain right by appropriation. We submit that neither the said predecessor nor its successor, the petitioner herein, is in a position to now assert the riparian right presented in this litigation.

Furthermore, the Oregon Water Code (*Section 34, Appendix to petitioner's brief, pp. 13-14*) gives ample time for any water user who may not have been personally served with notice, or who did not have actual

notice, to intervene and set up any claim to the use of the water of a stream. The State Engineer as an administrative board took jurisdiction of the matter and proceeded therewith. To that board petitioner should first go (*Porter v. Investors Syndicate,* 286 U.S. 461, 76 L. ed. 1226 (1932).

Petitioner would avoid the effect of the water code requiring all claimants on a stream to submit to an adjudication when one is ordered, upon the assertion that, because subdivision 8 of Section 70 of the water code (*Appendix to Pet. brief, p. 31*) requires all rights granted or declared by the act to be adjudicated in the manner provided in the act (Pet. brief, p. 29), and because of language used by the Supreme Court in the decision of *In re Willow Creek* with reference to those personally served with notice but not appearing, petitioner was not required to submit its riparian claim (Pet brief, pp. 179-182). Petitioner has not favored the court with information as to whom of its predecessors owned the land now claimed by petitioner at the time of the adjudication of the relative rights to the waters of Rogue River. It appears, however, that petitioner's predecessors were not among those served and *who failed to appear* (*R. 399*) and that at least the immediate predecessor was a party to the adjudication (*R. 70*). Regardless of this, we submit that petitioner's construction of the water code is entirely too narrow. If it be conceded for argument that Section 70 of the water code (*Appendix to Pet. brief, p. 29*) does indeed recognize, create or grant or declare some right in riparian owners, it does not follow that subdivision 8 of that section, providing that all rights granted or declared by the act shall be adjudicated as other rights, limits the adjudication to the rights so granted or declared. A reference to the act

in its entirety puts beyond reasonable argument any such contention. Section 11 of the water code (*Appendix to Pet. brief, p. 4*) provides that upon proper showing the Board of Control shall determine *relative* rights of various claimants to the use of the waters of a stream. Section 12 provides for notice by publication of the beginning of an investigation of the stream by the State Engineer. Section 13 provides for a notice by registered mail to those known to be in a position to claim the use of water. The fact that *relative* rights are to be determined and that this determination covers not only claimants by appropriation but all claimants, makes it certain that the legislature never contemplated that anyone could sleep on their rights as a riparian owner and decline to submit to the adjudication. Section 24 (*Appendix to Pet. brief, p. 10*) provides that the order of determination shall establish the "several rights" to the waters of a stream. Section 25 makes it clear that it covers not only rights for irrigation but all other rights, as it specifies certain additional information to be included in the water right certificate if the water is for irrigation. So we say as to said first contention of petitioner that the adjudication is not confined to those rights that are granted or declared in the code.

With respect to the asserted privilege of petitioner to exclude itself from the adjudication because it was not personally served with notice, we think this is not what is contemplated by the water code. The language of the Supreme Court of Oregon in the case of *In re Willow Creek* (p. 618, 74 Or.), asserted in petitioner's brief as construing the act to permit those not served with personal notice to escape the effect of the adjudication, we believe falls short of the contention offered by petitioner. The portion of the water code under discussion at that point is Section 34. The code clearly

divides the persons affected by the section into two classes, (1) those who are served with personal notice *or have knowledge of* the adjudication, and (2) those who do not have such knowledge. As to the first class, the court says "any such claimant" who fails to submit his proof would include only those who were duly served with process, but as to the second class, they would not be bound by the decree for the period of one year and would have that time in which to petition to intervene. Such is the clear meaning of the water code and we think a proper interpretation of the court's language in the case of *In re Willow Creek, supra.*

However, petitioner on this score could not escape the effect of the adjudication because it appears that petitioner's predecessor, California-Oregon Power Company, was a party to the adjudication, was awarded a water right by appropriation on the stream, and being a party to the adjudication would be bound to present all of the claims that it had.

## II.

**THE COMMON-LAW DOCTRINE THAT THE OWNER OF RIPARIAN LAND MAY INSIST THAT THE WATERS OF THE STREAM FLOW BY HIS LAND UNUSED BY HIMSELF AND TO THE EXCLUSION OF USE BY OTHERS HAS NEVER BEEN ADOPTED IN OREGON. NEITHER THE LEGISLATIVE OR JUDICIAL HISTORY OF THE STATE OF OREGON WILL SUSTAIN THE CONTENTION THAT THE POLICY OF THIS STATE HAS BUILT UP A RULE OF PROPERTY SUSTAINING THE IDLE WATER DOCTRINE.**

The common-law appropriated from the civil law the rule embodied in the phrase *"aqua currit et debet currere ut currere solebat."* The phrase has probably rolled off the judicial pen of some writer of opinions in every state in the land; often in cases so narrow in the issues involved as to inhibit a fair claim that the

use of the Latin sentence or its English translation in the course of the court's argument established a general rule of property; more often in cases dealing with nuisance—abuse in the use of water.

Respondent believes that neither the legislative nor the judicial history of Oregon justifies the contention of petitioner that the above-mentioned common-law rule became the settled policy of the State of Oregon so that petitioner or its predecessors in interest did or could rely on it as a rule of property.

**The common-law doctrine of riparian rights and the doctrine of non-riparian use of water are so opposed that the recognition of the latter is an immediate departure from the common law.**

The common law reserved to riparian owners the use of flowing water. To permit use by non-riparian owners was not the common law. (*Mettler v. Ames Realty Co.*, 61 Mont. 163, 201 Pac. 702, 705 (1921).)

The Ninth Circuit Court of Appeals has announced the point clearly:

> "The common-law doctrine of riparian rights being wholly inconsistent with and antagonistic to that of appropriation, it necessarily follows that when the federal and state governments assented to, recognized, and confirmed, with respect to the waters upon the public lands, the doctrine of appropriation, they in effect declared that that of riparian rights did not apply. The doctrine of appropriation thus established was not a temporary thing, but was one born of the necessities of the country and its people, was the growth of years, permanent in its character, and fixed the status of water rights with respect to public lands." *Van Dyke v. Midnight Sun Mining & Ditch Co.*, 177 Fed. 85, 91 (1910).

The Oregon Court has recognized the force of the antagonism between the doctrines, and while administering a modified common-law rule has said a claimant to the use of the waters of a stream may not claim both as a riparian owner and as an appropriator.

*Low v. Schaffer,* 24 Or. 239, 246, 33 Pac. 678 (1893).

*Williams v. Altnow,* 51 Or. 275, 300, 95 Pac. 200, 97 Pac. 539 (1908).

*Cavincss v. LaGrande Irrigation Co.,* 60 Or. 410, 421, 119 Pac. 731 (1911).

**The decision of what the policy of the State of Oregon may be as to the use of water rests with the State of Oregon.**

Claimants for riparian rights have been wont to cite *Sturr v. Beck,* 133 U.S. 541, 33 L. ed. 761 (1890), as holding that a patentee of the government acquires riparian rights if a stream touches the patented land. The case is not authority for this contention. It merely held that in a state *adhering to the common-law doctrine* (as Dakota then did by statute) the riparian right of the patentee related back to the date of entry or settlement. It is now settled beyond question that each state may determine its own water law, and the extent to which the common law rule of riparian rights will be recognized.

"It" (the State) "may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control." *Kansas v. Colorado,* 206 U.S. 46, 95, 51 L. ed. 956, 973 (1906).

"The effect of riparian rights, if established, would depend upon the local law." *Producers Oil*

*Co. v. Hanzen*, 238 U.S. 325, 338, 59 L. ed. 1330, 1336 (1914).

"It was long since affirmatively settled that such claim" (riparian rights on navigable waters) "solely involves a question of State law." *Norton v. Whiteside*, 239 U.S. 144, 153, 60 L. ed. 186, 190 (1915).

The same ruling is made as to non-navigable streams where use is claimed for power.

*State of Connecticut v. Commonwealth of Massachusetts*, 282 U.S. 661, 670, 75 L. ed. 603, 607 (1931).

**Both the legislative and judicial history of Oregon establish a policy contrary to the common law doctrine contended for by petitioner.**

At once it must be conceded that the law of Oregon proceeds according to the common-law, where suited to our situation and not modified by statute. The organic act of the provisional government of the Oregon Country before statehood provided:

"Sec. 2. The inhabitants of said territory shall always be entitled to the benefits of the writ of habeas corpus and trial by jury, of a proportionate representation of the people in the legislature, and of judicial proceedings, according to the course of common-law." *Deady's Code* 1845, p. 59.

When Congress established the territorial government of Oregon, it continued in force the laws of the provisional government. (*Act of August 14, 1848, Sec. 17, 9 Stat. ch. 177*). Also the Constitution of Oregon adopted by the people September 18, 1857, provided:

"All laws in force in the territory of Oregon when this Constitution takes effect, and consistent there-

with, shall continue in force until altered or repealed." *Const. Oregon; Art. XVIII, Sec. 7.*

The Supreme Court of Oregon has consistently ruled that by virtue of the foregoing provisions the common-law became the law of the state *only* "as far as it was general and not local in its nature and applicable to the conditions of the people * * * except as modified, changed or repealed by our own statutes," (*Peery v. Fletcher,* 93 Or. 43, 52, 182 Pac. 143 (1919)), and "so far as those rules were found to be applicable to existing conditions and suitable to the needs and necessities of the people," (*United States F. & G. Co. v. Bramwell,* 108 Or. 261, 265, 217 Pac. 332 (1923)).

In view of these authoritative rulings by the Supreme Court of the state, the provisional government and territorial legislation above mentioned did not at once impose on the people of Oregon the common-law doctrine of riparian rights, nor establish any rule of property that could not be changed by the legislature. We must look to the legislative and judicial history after statehood to find whether the common-law rule of riparian rights, without change, was found to be applicable to conditions and suitable to the needs and necessities of the people.

**History Prior to April 20, 1885.**

It will serve the convenience of the court to divide this point of our discussion into two phases, (1) that prior to April 20, 1885, because on that date patent was issued by the United States conveying to Francis Marion Friedenburg the lands now owned by petitioner, and (2) the period between April 20, 1885, and March 11, 1921, because on the latter date petitioner became owner of said lands (*R. 67*). Petitioner claims that the State of Oregon had become so committed to

the common-law policy of riparian rights as to constitute a rule of property upon which petitioner could rely. Petitioner did not favor the court with the derangment of title from the patentee, Friedenburg (*R. 64*). The only dates indicating the acquisition of title are those above mentioned. The policy of the state, if any definite policy had been established, must be ascertained as of those dates in determining whether there was a rule of property upon which a purchaser was justified in relying.

**Act of 1864.**

The first legislative action of the young State of Oregon with respect to waters was contrary to the common-law doctrine of riparian rights. The legislature in 1864 enacted a law with respect of mining which empowered miners to make local laws in relation to the possession of water rights, *subject to the laws of the United States. (Appendix 3, Act of 1864, Sec. 6.)*

Clearly this was contrary to the course of the common-law and is early denial that the common-law of riparian rights was to be the policy of Oregon.

In 1866 Congress enacted the law recognizing the nature of water rights that had grown up in Oregon and other Western States thus confirming those rights where they originated on public lands.

In 1877 Congress enacted the so-called Desert Land Act *(Appendix to petitioner's brief, p. 103)*, to which we shall refer later. Oregon construed this act to deny riparian rights to lands patented after March 3, 1877. (*Hough v. Porter,* 51 Or. 318, 399, 95 Pac. 732, 98 Pac. 1083 (1908).)

So far as a state policy was evidenced by legislation, we believe the foregoing expresses that policy up to

April 20, 1885. The act of 1864 makes the later federal legislation a part of the state policy. Both federal acts are contrary to the common-law rule of riparian rights, as is the Oregon legislation of 1864. Guaged by legislation, Friedenburg, as patentee of the United States, had no basis for asserting a vested property right in the common-law doctrine of riparian rights, and there is no evidence that he even knew of it.

Respondent believes the decisions of the Supreme Court of Oregon during the period prior to April 20, 1885, furnish just as small comfort to petitioner. During that period there was considerable use of the common-law terms respecting riparian rights. We think, however, there was not a single authoritative decision —certainly not one that could be fairly claimed to have established a general rule of property for those whose property was not involved in the litigation decided. Frequently the court indulged in general discussion of principles quite unnecessary to the narrow issues presented by the case. For this reason it is important to ascertain the issues in each case to see just what was decided.

*Taylor v. Welch*, 6 Or. 198 (1876).

In this case both parties claimed to be riparian owners, the plaintiff claiming only the natural uses of the water (which has always been conceded to the riparian owner to this day) and asserting an unlawful upper diversion by defendant. The case failed because the court found the water used by plaintiff was percolating water and not a flowing stream. This finding narrowed the issues too much to make discussion of riparian rights authoritative.

*Dodge v. Marden,* 7 Or. 456 (1879).

Defendants' ditch, constructed prior to 1866, crossed land acquired from the United States after the ditch was constructed. Defendants' right to maintain the ditch was sustained, the court thus recognizing the power of non-riparian land to acquire a water right under the Congressional Act of 1866.

*Hayden v. Long,* 8 Or. 244 (1880).

This was an action to abate a nuisance alleged to consist in defendant's diverting water above plaintiff's power device, and sending the water down to plaintiffs' reservoir charged with earth. The case was reversed because the trial court submitted the issues to the jury on the theory that both parties were riparian owners, whereas defendant was not riparian. It was a case of abuse of water.

*Coffman v. Robbins,* 8 Or. 278 (1880).

A quarrel between ranchers, both of whom were riparian to the stream, over water for irrigation. The existence of riparian rights was conceded, and not in issue. The water had been divided by agreement, which the court enforced.

*Shaw v. Oswego Iron Works,* 10 Or. 371 (1881).

A riparian owner sued to enjoin the diversion of water above his land. The sole issue was whether a non-meandered fresh water stream was navigable, and, if so, whether the bed of the stream belonged to the state or the riparian owner. There was no issue on the right of a riparian owner on a non-navigable stream to have the stream flow through his land undiminished. The court found the stream was not navigable, that the

riparian owners' title extended to the thread of the stream, and enjoined diversion. The right to the flow of the stream if not navigable was apparently conceded by defendant and not litigated. The court, in the course of its opinion, recognized that the common-law rights of riparian owners are much modified in the United States with respect to fresh-water navigable streams.

*Shively, et al v. Hume, et al,* 10 Or. 76 (1881).

The facts of this case, as stated in the opinion, do not make the relative positions of the parties clear, but both appear to be riparian owners. The plaintiff secured household water by sinking a barrel near the stream; the defendant constructed a tank above plaintiff's barrel in which he caught most of the water of the stream and diverted it to a mill. The only question was whether plaintiff's land was riparian. The parties conceded the case should be ruled by the common-law of riparian rights, so there was no issue on that.

The foregoing are all of the decisions of the Supreme Court of Oregon rendered prior to April 20, 1885, of which we have knowledge, that approach the question of riparian rights, even remotely. In none of them was the existence in Oregon of the common-law doctrine of riparian rights an issue. In three of them (*Taylor v. Welch, supra; Coffman v. Robbins, supra;* and *Shively v. Hume, supra*) both parties were riparian owners, claimed as such, and presented only the question of the relative rights of such owners. In one of them (*Shaw v. Oswego Iron Works, supra*) riparian rights were conceded if the stream was not navigable. One of them was to abate a nuisance (*Hayden v. Long, supra*) and one recognized a departure from the common-law riparian rule (*Dodge v. Marden, supra*).

Without an issue presented to the court as to the policy of Oregon with respect to riparian rights, we submit the court can not be held to have established a rule of property to bind the future. The facts would justify the conclusion that by April 20, 1885, the legislature had indicated a modification of the common-law doctrine of riparian rights, and the courts had applied the common-law where both parties conceded it.

**History from April 20, 1885, to March 11, 1921.**

We shall not burden the court with an attempt to analyze each water case decided during this period. They indicate a progressive departure from the common-law doctrine of riparian rights, a progressive formulation of a water policy for the State of Oregon that finally crystallized in legislation definitely making beneficial use the measure of right.

It should be stated, that in all discussion of riparian rights in the State of Oregon what is called the "natural rights" or "natural needs" of the riparian owner is always conceded and is recognized today, to-wit, the right to have water for household domestic use, stock water and garden irrigation (*Cavincss v. LaGrande Irrigation Company*, 60 Or. 410, 420, 119 Pac. 731 (1911); *In re Hood River*, 114 Or. 112, 190, 227 Pac. 1065 (1924)).

These natural rights were recognized and carefully preserved to petitioner in the decree of the trial court in the case at bar by providing that the water should always be maintained at an elevation that would permit water at all times to wash the banks of the stream on petitioner's lands (*R. 74, 79*).

We think a fair statement of the judicial history of the State of Oregon with respect to water rights from 1885 to 1921 would be that the court recognized ri-

parian rights where no issue was made on that point and between rival riparian owners administered the law according to the common-law doctrine of riparian rights, that it declared a modified doctrine of riparian rights, that it administered the law according to the rule of prior appropriation, and was without definite policy that could establish any rule of property until the rule of beneficial use was announced by the legislature.

The following cases are illustrative of those in which both plaintiff and defendant claimed as a riparian owner. There was no issue as to the existence of the doctrine of riparian rights and the court adjudicated their claims accordingly.

*Weiss v. Oregon Iron & Steel Company*, 13 Or. 496, 11 Pac. 255 (1886).
*Cox v. Bernard*, 39 Or. 53, 64 Pac. 860 (1901).

In each of the above mentioned cases the court discussed the common-law doctrine of riparian rights. The case of *Weiss v. Oregon Iron & Steel Company, supra*, is the case most cited in this state with respect to riparian rights and the case upon which petitioner here seems to most rely. It is the earliest case in Oregon undertaking to discuss and fully apply the common-law doctrine of the right of a riparian owner to lay the dead hand of idleness on the entire course of the stream above him, and it is the only case of which we have knowledge in which the Supreme Court of Oregon undertook to apply the doctrine of the right of a riparian owner to insist that the water flow by his premises without use. Yet that case is not a case of authority on the point involved here. While the court announced all of the principles of the common law as to riparians, the facts were that both parties were

riparian owners and each conceded that their rights should be determined by the law applicable to riparian ownership. The only real question was the manner and extent of the use of water by a riparian owner as against another riparian owner, and in this respect the court held that the use of water for manufacturing is not a natural use and refused to ease the common-law rule. There was no challenge of the riparian common law. We submit that without an issue made between a claim by appropriation and one through riparian ownership, in short where both parties concede the law under which their rights are to be determined, such a decision could hardly be beld to constitute a rule of property. The decision was rendered June 9, 1886, *more than one year after patent issued to petitioner's land.* That decision could not have established a rule of property for the purchase of land one year prior to its rendition and we say the petitioner did not accept its deed in 1921 in reliance upon the decision in *Weiss v. Oregon Iron & Steel Works* because prior to 1921 the State of Oregon had, through legislation, definitely established a contrary policy.

There is another class of cases in which the court definitely stated that the doctrine of riparian rights as it existed at the common law does not exist in the State of Oregon but is administered in a modified form. (*Carson v. Gentner,* 33 Or. 513, 52 Pac. 506 1898); *Brown v. Baker,* 39 Or. 66, 70, 65 Pac. 799, 66 Pac. 193 (1901); *Williams v. Altnow,* 51 Or. 275, 300, 95 Pac. 200, 97 Pac. 539 (1908).)

In the case of *Carson v. Gentner, supra,* the court made a fairly full statement with respect to this modified common law rule.

"The doctrine of the common law, that the water of a stream must continue to flow in its natural channel undiminished in quantity and unimpaired in quality, has been very much modified in the territory embraced in the Pacific Coast States, where a new rule, founded upon the necessities under which the early settlers labored, has been inaugurated. So much, only, of the common law was adopted by these settlers as was applicable to the condition of the country in which their lot was cast; and, realizing that water is a powerful agent in separating the precious metals from the baser materials in which they are imbedded, and also serves, when used in irrigating arid tracts, to cause the desert to bud, blossom and bear fruit, and that without the use of such water a vast region must forever remain valueless and uninhabited, necessity compelled these primitive lawgivers to adopt for their government a code of customs which prescribed the extent of public land each was entitled to, and regulated the manner of appropriating water to the operation of mines and the cultivation of farms, orchards, and vineyards. This latter custom provided that he who first changed the course of a natural stream flowing through public lands, which at the time was common to all, and appropriated the water so diverted to some useful purpose, thereby acquired a superior right to continue to use thereof against every claimant except the United States. The justice of this custom was recognized by the courts, which enforced its provisions in opposition to the doctrine of the common law; and the legislative assemblies of these states, following the example set by the courts, have passed in many instances acts guaranteeing protection to prior appropriators in their possessory rights in the diver-

sion of water against all claimants except the sovereign. The legislative action of this state on the subject is embodied in section 3832, Hill's Ann. Laws, approved October 24, 1864, which reads as follows: 'Miners shall be allowed to make local laws in relation to the possession of water rights, the possession and working of placer claims, and the survey and sale of town lots in mining camps, subject to the laws of the United States.'"

However, six years later, in the case of *Brown v. Baker, supra,* the court (39 Or., p. 70) declared the ancient common-law doctrine that would permit the first settler on a stream to have the entire flow even though it prevented the use of water by others, then on the same page stated that the right of appropriation and the doctrine of riparian ownership are entirely incompatible, and finally wound up (p. 75) by awarding to the plaintiff a *definite amount of water* (195 inches) which, under repeated decisions of this court, classed the plaintiff's claim as a claim by appropriation because no riparian owner has a right to a definite amount of the water of the stream. This is true of very many cases decided during this period by the Supreme Court of Oregon. The law of riparian rights was discussed learnedly and the cases decided on the doctrine of appropriation. Such was the case of *Bowman v. Bowman,* 35 Or. 279, 280, 57 Pac. 546 (1899). There both parties were riparian to the stream and claimed water for irrigation, but they claimed a diversion and appropriation to beneficial use of a definite amount of water and their rights were adjudicated as appropriators along with some discussion of riparian rights.

The same is true of the following cases in which there will be found discussion of the law of riparian

rights and what a riparian owner may insist upon to the exclusion of other water users, and yet the decision of the court was not by the rule of riparian rights but upon the doctrine of appropriation. (*Faull v. Cooke*, 19 Or. 455, 467, 26 Pac. 662 (1896); *Low v. Schaffer*, 24 Or. 239, 33 Pac. 678 (1893); *Gardner v. Wright*, 49 Or. 609, 91 Pac. 286 (1907); *Caviness v. LaGrande Irrigation Co.*, 60 Or. 410, 119 Pac. 731 (1911).)

The cases last mentioned were not only decided upon the doctrine of appropriation, frequently with an unnecessary discussion of the common law of riparian rights, but they held that the two systems were so antagonistic that the claimant could not assert both a riparian right and a righ by appropriation on the same watercourse.

Then we have another class of cases in which the doctrine of appropriation alone is applied. Of this class are (*Ison v. Sturgill*, 57 Or. 109, 109 Pac. 579, 110 Pac. 535 (1910); *Cantrall v. Sterling Mining Co.*, 61 Or. 516, 122 Pac. 42 (1912)).

And again there are a series of cases in which the doctrine of appropriation was applied in upholding a prescriptive or adverse user claim against an alleged riparian right. Illustrative of these cases are (*Oregon Construction Co. v. Allen Ditch Co.*, 41 Or. 209, 215, 69 Pac. 455, 93 A.S.R. 701 (1902); *Britt v. Reed*, 42 Or. 76, 80, 70 Pac. 1029 (1902); *Davis v. Chamberlain*, 51 Or. 304, 309, 98 Pac. 154 (1908)).

In the case of *Britt v. Reed, supra*, in which the defendant settled upon a stream after the plaintiff had made an appropriation therefrom, the court seemed to question whether the riparian settler acquired any

rights to other than the natural uses by such settlement. There appears at page 80 the significant statement:

> *"Whatever rights* the defendant acquired as riparian proprietor by reason of his settlement on the stream were subordinate and subject to the prior rights of the plaintiffs and appropriators and must be exercised in subordination thereto."

This is significant because the opinion was written by Mr. Justice R. S. Bean who later, in 1908, wrote the opinion in the case of *Williams v. Altnow*, 51 Or. 275, 298, 95 Pac. 200, 97 Pac. 539 (1908) in which, for the first time, a serious question was presented as to whether any riparian rights other than the natural rights would go with a settlement upon riparian land after the enactment of the Desert Land Act by Congress. From an early day the court has limited all water rights to the amount actually needed for the purpose to which the water is to be applied.

In the case of *In re Rogue River Adjudication*, 120 Or. 237, 240, 251 Pac. 989 (1927), which was an appeal from the final adjudication of the relative rights to the stream upon which petitioner in this case is now claiming a riparian right that was not submitted to the adjudication, the court used this significant language:

> "It has always been the policy of the law, and still is, to permit any person to make any beneficial use of any water flowing in any non-navigable public stream."

The court has even gone so far as to deny an absolute right to the use of water claimed under a prior decree, limiting the amount to that which was actually

needed by the one to whom it was decreed. (*Claypoole v. O'Neill*, 65 Or. 511, 513, 133 Pac. 349 (1913).

We think it fair to say that until the enactment of the Water Code (1909) the policy of the State of Oregon with reference to water rights was developing. Perhaps it would not be disrespectful to our court to say it was in a state of flux. At any rate it was certainly too uncertain for anyone to pick out one single decision and declare it a rule of property unless it adjudicated the rights to the very property involved.

**Oregon Water Code of 1909.**

In 1909 the legislature enacted a water code defining water rights, the method of acquiring them and of having them adjudicated (*Appendix to petitioner's brief, p. 1*). This was a crystallization of the groping for a definite water policy evidenced by the decisions we have referred to above. The constitutionality of the method for adjudicating water rights provided by this legislation was upheld by this court (*Pacific Livestock Company v. Lewis*, 241 U.S. 440, 60 L. ed. 1084 (1916). Thereafter the Supreme Court of Oregon, prior to 1921, upheld the provisions of this water code, limiting riparian rights to the amount of water put to a beneficial use or in process of being put to a beneficial use at the date of the enactment of the water code. (*In re Willow Creek*, 74 Or. 592, 628, 144 Pac. 505 (1915) and thereafter ruled that in the case of *In re Willow Creek, supra*, it was decided that riparian rights were limited to the amount of water put to a beneficial use. (*In re Hood River*, 114 Or. 112, 176, 227 Pac. 1065 (1924).

We are not now discussing the constituionality of Section 70 of the Water Code (*Appendix to petitioner's brief, p.* 29) defining a vested riparian right. We are discussing the claim of petitioner that it purchased its

riparian lands in 1921 relying on a vested common law riparian right as a rule of property in Oregon. The only decision we know of in the State of Oregon sustaining the rule of idle water is *Weiss v. Oregon Iron & Steel Company, supra*, decided June 9, 1886. Since that time and prior to 1921 the Supreme Court of Oregon frequently announced the rule of beneficial use and in 1909 the legislature of the state definitely denied the constant flow theory. In 1915 the Supreme Court of Oregon passed its opinion *In re Willow Creek, supra*, in which it definitely limited the riparian right of an irrigator to the amount actually beneficially used before the enactment of the Water Code. Petitioner, in purchasing its lands, could not have relied on the early case of *Weiss v. Oregon Iron & Steel Company, supra.*

There is yet another class of cases which are asserted by petitioner to sustain its claim that the State of Oregon is committed to the common-law doctrine of riparian rights. We think the cases do not sustain the point they are cited to. They are nuisance cases exemplifying an abuse of the use of water to the damage of others. Illustrative of them are (*Carson v. Hayes*, 39 Or. 97, 99, 65 Pac. 814 (1901); *Trullinger v. Howe*, 53 Or. 219, 222, 97 Pac. 548, 99 Pac. 880 (1908); *Logan v. Spaulding Logging Company*, 100 Or. 731, 190 Pac. 349 (1920); *Harris v. Southeast Portland Lumber Co.*, 123 Or. 549, 557, 262 Pac. 243, 245 (1927)).

In the case of *Carson v. Hayes, supra*, a placer miner was impounding water and then turning it loose for the purpose of sweeping down stream the tailings from his operation. He thereby deposited them on the lands of plaintiff. This abuse was enjoined. In the cases of *Trullinger v. Howe, supra*, and *Logan v. Spaulding Logging Company, supra*, the defendants were impounding water in a floatable stream with

"splash" dams, filling the pond with logs and then opening the dam and shooting the immense volume of water charged with logs down stream. It resulted in flooding the power plant of Trullinger and the grist mill of Logan. This action again was enjoined.

In *Harris v. Southeast Portland Lumber Company, supra,* the plaintiff, owner of a summer home through which Johnson Creek flowed, complained because a mill owner whose mill was situated adjoining and downstream from plaintiff's summer home constructed a dam in the channel of the stream and backed the water up on the summer home so that the same became stagnant, filled with refuse and offensive. This abuse of water was enjoined.

To enjoin depositing mining tailings on one's land or the artificial flooding of one's grist mill or power plant or backing up water on one's land is hardly a recognition of the common law right to monopolize a stream contended for by petitioner. It is worth noting that both Trullinger's power plant and Logan's grist mill were in operation when the water code was enacted in 1909 and therefore had a vested right protected by that code.

Also it is contended that the case of *Norwood v. Eastern Oregon Land Company,* 112 Or. 106, 227 Pac. 1111 (1924) commits the State of Oregon to the doctrine of riparian rights even though that decision was rendered after the legislation of 1909 above referred to and in the same year in which the decision of the court was handed down in the case of *In re Hood River, supra.* We think there is no fair basis for this contention. The Norwood case must be read in light of the fact that it was litigation to enforce a prior decree of the court. The waters of Willow Creek were adjudicated and a final decree of the Supreme Court rendered in 1915 (*In re Willow Creek,* 74 Or. 592, 144 Pac.

505). In that case the Eastern Oregon Land Company had claimed as a riparian owner for the irrigation of approximately 7,000 acres of land, of which only approximately 292 acres had actually been irrigated. The court rejected the riparian claim as to all water that had not been put to a beneficial use and limited the water right of the Eastern Oregon Land Company under this claim to 292 acres (74 Or. 621, 628). After that decree was entered so limiting the right of the Eastern Oregon Land Company, it undertook to change the place of use of the water granted for its 292 acres and was sued by Norwood because Norwood was damaged by that change. The court in the case of *Norwood v. Eastern Oregon Land Company, supra,* was not determining any other question and certainly not any question of riparian rights other than that *as to irrigation* a riparian right is inseparable from the land.

A discussion of the judicial decisions in Oregon prior to 1921 would not be complete without a reference to the decision of Judge Bean in the case of *Eastern Oregon Land Company v. Willow River Co.*, 187 Fed. 466, 468 (1910). It is the habit of proponents of the riparian doctrine to quote only a portion of Judge Bean's statement on the subject of riparian rights. The full quotation is as follows:

"The *general* doctrine of riparian rights is too firmly established in this state to be shaken now by *judicial* decision. It is useless to cite authorities. The riparian proprietor is entitled to the ordinary and usual flow of the stream *as long as it is of any beneficial use* to him and this may, under some circumstances, include flood or overflow waters reasonably to be anticipated during ordinary seasons. * * * The modern tendency is to make the benefi-

cial use of water the test of the right, and, *unless it is put to a beneficial use* by a riparian proprietor or is of some substantial benefit to him, he ought not to be allowed to prevent its use by others." (Italics ours.)

It is to be noted that in that portion of the quotation relied upon by riparians the judge was referring only to the *general* common-law doctrine and concludes that is should not be overthrown by *judicial* decision. This is far short of a statement that the people through their legislature could not change the doctrine. Furthermore, he confines the riparian proprietor's right to the flow of a stream to the amount put to a *beneficial use,* and in that case denied an injunction because he concluded that the benefit of the flow of the stream would not be very great to the riparian owner.

Thereafter the Circuit Court of Appeals for the Ninth Circuit had the same question up in *Pacific Livestock Company v. Silver River Irrigation Co.,* 200 Fed. 487, 491 (1912) and definitely ruled that riparian rights have only a limited application in the State of Oregon.

**Legislation since April 20, 1885.**

Two legislative acts subsequent to April 20, 1885, are relied on by petitioner,—the Act of 1891 extending the right of eminent domain to those appropriating water for sale for irrigation and domestic use (*Appendix p.* 4), and the Act of 1899 extending the right of eminent domain to those appropriating water for public power purposes (*Appendix, p.* 19). The Act of 1891, in Section 8, and the Act of 1899, in Section 9, contain identic language. We quote from the Act of 1891:

"Such corporation may also maintain an action for the condemnation and appropriation of the right to the flow of water in any stream from which it proposes to divert water below the point of diversion vested in the owners of lands lying contiguous to such stream by virtue of their location."

Petitioner seems to think that this language constitutes a recognition of the *very* right for which he is contending. We submit that recognition of a riparian right to have the stream flow *undiminished* and *unused* cannot be spelled out of this sentence. The language is vague. If meaning is given to every word in the sentence it would most fairly be construed to mean that the irrigator would have the right to condemn a water right gained by the riparian owner *actually applying the water to a beneficial purpose* through a diversion. The condemnor who proposes to divert water water below "the point of diversion" vested in the riparian owner by virtue of riparian ownership is given the right to condemn the flow of the water to the point of diversion so vested in the riparian owner. It seems to distinguish a point of diversion on public land from one on private land.

In addition to the legislation of 1891 and 1899 above mentioned, the legislature in 1893 passed an act (*Appendix 17*), which constitutes the first grant of a right to riparian owners. That grant is the right to use devices to raise water flowing through deep banks for the purpose of irrigation. If the common law of riparian rights existed in Oregon this Act of 1893 would be superfluous. The grant of these specified rights to a riparian owner indicates a legislative recognition that the common-law doctrine did not prevail in the State of Oregon. In 1905 the first attempt was made to provide for adjudication of water rights, the act

of that year providing (*Sec. 5, Appendix, p. 33*) for the adjudication of all rights on a stream from which there was to be an appropriation of water for general reclamation under guidance of the United States. A complete water code, which is under attack in this litigation, was passed in 1909 (*Appendix to petitioner's brief, p. 1*). In the same year the legislature declared all water in the State to be public property (*Appendix, p. 38*). In 1911 the legislature passed an act requiring certain fees to be paid by those claiming a water right for the development of power (*Appendix, p. 40*). This act recognizes a water right in those who developed the power prior to the enactment of the Water Code. Incidentally, we may mention in passing that nothing in this case indicates that petitioner or its predecessors in interest have ever paid any fees under this act. In 1913 the legislature enacted a law specifically providing that beneficial use shall be the basis, the measure, and the limit of all rights to the use of water in the State of Oregon except those claimed for municipal purposes (*Appendix, p. 43*).

**There is no rule of property to protect petitioner's claimed riparian right.**

The doubtful claim of a rule of property based upon a court decision may only be asserted where that decision is rendered prior to the acquirement of the land involved and where the one acquiring the land may rely upon the decision as a rule of property.

*2 Lewis' Sutherland Statutory Construction*, 2d ed., Sec. 485, p. 906.

*Sauer v. City of New York*, 206 U.S. 536, 51 L. ed. 1176, 1187 (1907).

*O'Neil v. Northern Colorado Irrigation Co.*, 242 U.S. 20, 61 L. ed. 123, 129 (1916).

*Haskett v. Maxey*, 34 Ind. 182, 33 N.E. 358, 19 L.R.A. 379 (1893).

*Burgess v. Seligman*, 107 U.S. 20, 27 L. ed. 359 (1882).

If the decisions of the court have been sufficiently clear-cut to justify a claim of a rule of property and thereafter, and before one claiming a rule of property has purchased, the policy of the state is changed by different decisions from the highest court, the later decisions will defeat the claimed rule of property.

*Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 361, 77 L. ed. 360, 365 (1932).

*Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450, 68 L. ed. 382, 385 (1924).

*Fleming v. Fleming*, 264 U.S. 29, 31, 68 L. ed. 547 (1924).

*Fidelity Columbia Trust Co. v. City of Louisville*, 245 U.S. 54, 62 L. ed. 145, 149, L.R.A. 1918C, 124 (1917).

*Mason v. A. E. Nelson Co.*, 148 N.C. 492, 62 S.E. 625, 18 L.R.A. (N.S.) 1221 (1908).

Whatever may have been the decisions of the Supreme Court of Oregon when the legislature in 1909 passed a law eliminating unused riparian claims, it destroyed any contention of a rule of property based upon decisions prior to the legislation or upon any decision contrary to the legislation.

*Abilene Natl. Bank v. Dolley*, 228 U.S. 1, 5, 57 L. ed. 707, 709 (1913).

*Bean v. Morris*, 221 U.S. 485, 55 L. ed. 821 (1911).

*United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 706, 43 L. ed. 1136, 1142 (1899).

*United States v. United Shoe Machinery Co.*, 264 Fed. 138, 150-151, 258 U.S. 451, 66 L. ed. 708, 259 U.S. 575, 66 L. ed. 1071 (1920).

Prior to April 20, 1885, when the United States issued patent to the land now claimed by petitioners, there had been no decision of the Supreme Court of Oregon determining as a *litigated point* that the common-law doctrine of riparian rights was the law of Oregon. True, there were a number of decisions in which the court discussed the common-law doctrine of riparian rights when that doctrine was not an issue in the litigation. Decisions, however, are authority only for those matters *litigated* and *decided*. Particularly they are not to be given the dignity of establishing a rule of property as to matters of general discussion in the decision, and which were not presented to the court by challenge.

*Cohens v. Virginia*, 6 Wheat 265, 5 L. ed. 257, 290 (1821).

*Harriman v. Northern Securities Co.*, 197 U.S. 244, 291, 49 L. ed. 739, 761 (1905).

*St. Anthony's Water Power Co. v. Board of Water Commissioners*, 168 U.S. 349, 361, 42 L. ed. 497, 502, 504 (1897).

*Union Tank Company v. William A. Wright*, 249 U.S. 275, 286, 63 L. ed. 602, 608 (1919).

*Brewer-Elliott Oil & Gas Company v. United States*, 260 U.S. 77, 83, 67 L. ed. 140, 144 (1922).

7 R.C.L. 1003.

*2 Lewis' Sutherland Statutory Construction*, 2d ed., Sec. 486, p. 907.

Narrowing the cases to the actual point in controversy and decided, there will not be found in Oregon one single case sustaining the right of a riparian owner to the continuous flow of the stream undiminished in quantity and unimpaired in quality without putting the same to a beneficial use as against an

appropriator. As we stated earlier in this brief, the court has with learning discussed riparian rights and decided the case on the doctrine of appropriation, and where the question of the existence of riparian rights is conceded by the litigants has decided their rights on that doctrine. Prior to the acquisition of petitioner's property in 1921 both the Supreme Court of Oregon and the legislature of Oregon had definitely ruled out any earlier expressions with respect to recognizing the existence of riparian rights to the flow of the stream in this State.

The legislation of Oregon will not justify a claim that petitioner had a right to rely thereon for its claim of riparian rights. Much force is claimed by petitioner for the enactment of the early settlers constituting the provisional government of the Oregon Territory that justice should be rendered according to the course of the common law and that this was carried into the Constitution of Oregon. We think too much is claimed for this. (*Funk v. United States*, 290 U.S. 371, 384, 78 L. ed. 369, 376 (1933)). This court, in this exhaustive and well reasoned opinion, reviewed the discussions of the courts of many of the states and pointed out that the adoption of the common law generally leaves to each state the matter of determining to what extent it shall be applied in particular matters.

The only legislation subsequent to Oregon statehood is legislation providing for rights that are contrary to the doctrine of the common law, until the final enactment of 1909 definitely limiting claimed riparian rights to the amount of water put to a beneficial use. We submit that any contention that a riparian right attached to its property upon which petitioner could rely in purchasing the same is without substance.

## III.

## THE DESERT LAND ACT

The congressional act of March 3, 1877 (*Appendix to petitioner's brief, p. 103*), popularly known as the Desert Land Act, has had consideration from but few courts with respect of its effect, if any, upon riparian water rights as an incident to the ownership of land patented after the enactment of the Desert Land Act. Insofar as the land involved in the instant case was patented April 20, 1885, a holding that riparian rights were not an incident of ownership of the land after patent would at once determine this case against the contention of petitioner.

So far as we have been able to ascertain, four state courts have discussed the point here involved, but it has not been definitely decided by this court, with which must rest final construction of the Desert Land Act: *Ex parte Tyler*, 149 U.S. 164, 192, 37 L. ed. 689, 697 (1893).

The Desert Land Act with respect of irrigation was under discussion by this court in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703, 706, 43 L. ed. 1136, 1141, 1142 (1899), where there was involved a suit by the United States to restrain the defendant from damming the Rio Grande River in the Territory of New Mexico, and involved largely the question of navigability of that river. After holding that each state may modify the common-law rule as to waters, subject to the superior control of Congress on navigable streams, the court calls attention to the fact that the Congress recognized the inapplicability of the common-law rule in many of the western states, and passed the Act of 1866, the Desert Land Act of 1877, and the Act of March 3, 1891 (26 Stat. at Large

1101), granting rights of way for ditches across public lands, and then makes this comment with respect of these acts:

> "Obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common-law rule as to continuous flow. To infer therefrom that Congress intended to release its control over the navigable streams of the country and to grant in aid of mining industries and the reclamation of arid lands the right to appropriate the waters on the sources of navigable streams to such an extent as to destroy their navigability, is to carry those statutes beyond what their fair import permits."

Four years later, in the case of *Gutierres v. Albuquerque Land & Irrigation Co.*, 188 U.S. 545, 555, 47 L. ed. 588, 593 (1903), this court again had occasion to consider the Desert Land Act in a case arising from the Territory of New Mexico, in which the appellee sued to enjoin the appellant from interfering with preliminary work looking to the construction of canals for the diversion of the waters of the Rio Grande River. The court again reviewed the legislation of Congress above mentioned, with particular emphasis upon that portion of the Desert Land Act reserving for appropriation and use "all surplus water * * * of all, lakes, rivers and other sources of water supply upon the public lands and not navigable," and then said this with respect to the construction of the Desert Land Act:

> "We perceive no merit in the contention that the proviso in the Desert Land Act of March 3, 1877, declaring that surplus water on the public domain shall remain and be held free for the appropriation

and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights, is an expression of the will of Congress that all public waters within its control or the control of a legislative body of its creation, must be directly appropriated by the owners of land upon which a beneficial use of water is to be made, and that in consequence a territorial legislature cannot lawfully empower a corporation, such as the appellee, to become an intermediary for furnishing water to irrigate the lands of third parties."

Five years after the decision last referred to, this court decided *Boquillas v. Curtis,* 213 U.S. 339, 344, 53 L. ed. 822, 825 (1908); which involved a decision of the Supreme Court of the State of Arizona that riparian rights had legally been terminated in that state by legislation. This court declined to determine whether lands in the Desert Land states patented after March 3, 1877, did not carry riparian water rights, but referred to the decision of the Supreme Court of Oregon on that subject (*Hough v. Porter*) and stated it was based "on plausible grounds," and referred to the two decisions of this court above cited, as pointing to the conclusion reached by the Oregon court.

Fourteen years later, this court decided *Wyoming v. Colorado,* 259 U.S. 419, 465, 66 L. ed. 999, 1012 (1922), and construed the Desert Land Act of March 3, 1877, to be a part of the Congressional legislation in contravention of riparian rights.

While this court has not directly passed upon the question, we believe the foregoing decisions commit this court at least to the proposition that patents issued by the government conveying lands within the

Desert Land states after March 3, 1877, convey that land subject to some modification of the ancient common-law doctrine of riparian rights.

The State of Oregon early construed the Desert Land Act to eliminate riparian rights with respect of lands in this state patented after March 3, 1877, and since January, 1909, the Oregon court has consistently so ruled. The matter first came under the notice of the Supreme Court of Oregon in *Williams v. Altnow,* 51 Or. 275, 296, 298, 95 Pac. 200, 97 Pac. 539 (1908). In that case Altnow claimed both as a riparian owner, and as a prior appropriator. At page 296 of the Oregon Report the court said:

> "By the Desert Land Act, a claimant's right to water for irrigation and reclamation must depend upon a bona fide prior appropriation (Section 1, Act March 3, 1877, c. 107, 19 Stat. 377 (U.S. Comp. St. 1901, p. 1548) 6 Fed. St. Ann. p. 393), but there is nothing in the act which requires that the appropriation should be from one stream or source of supply, or which denies a settler the right to use on such claim water to which he has a bona fide right by prior appropriation from any source."

And then at page 298 added this:

> "And, again, it is a serious question whether the Desert Land Act does not abolish the so-called modified doctrine of riparian rights, which gives to riparian proprietors the right to use water for irrigation as to all lands through which non-navigable streams flow, the title to which has been acquired from the government of the United States since the passage of that act. It declares that all surplus waters over and above that appropriated by the desert land

claimant, 'together with the waters of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights.' The government of the United States, as the primary owner of the soil, undoubtedly has the right to make such provisions concerning the waters of non-navigable streams thereon as it deemed proper, and it is at least a debatable question whether, by the language quoted, Congress did not intend to recognize and assent to the appropriation of such waters in contravention to the common-law doctrine of riparian rights as to persons subsequently acquiring title from the United States: *United States v. Rio Grande Irr. Co.,* 174 U.S. 690 (19 Sup. Ct. 700; 43 L. ed. 1136). But it is not necessary to decide either of the questions suggested at this time."

Three months later the Supreme Court of Oregon decided *Hough v. Porter*, 51 Or. 318, 382, 399, 95 Pac. 732, 98 Pac. 1083 (1909). Beginning at page 382 of the Oregon Report is the court's discussion of the effect of the Desert Land Act, and at page 399 the Supreme Court of Oregon announced its definite conclusion "that all lands settled upon after the date of the latter act (Desert Land Act) were accepted with the implied understanding that * * * the first to appropriate and use the water for the purposes specified in the act should have the superior right thereto."

This court announced the decision of the Supreme Court to be upon plausible grounds in *Boquillas v. Curtis, supra,* and we submit that the reasoning of the Supreme Court of Oregon in this case is clear and justifies the conclusion reached. The rule announced in

that decision has been applied ever since by the Supreme Court of this state. (*Hill v. American Land & Livestock Co.*, 82 Or. 202, 207, 161 Pac. 403 (1916) and the decision of the Supreme Court of Oregon in *Hough v. Porter, supra,* has been approved and followed by the Supreme Court of South Dakota (*Cook v. Evans,* 45 S. Dak. 31, 185 N.W. 262, 264 (1921); *Haaser v. Englebrecht,* 45 S. Dak. 143, 186 N.W. 572 (1922).

The Supreme Court of California, however, declined to follow *Hough v. Porter, supra,* and in *San Joaquin & King's River Canal & Irrigation Co. v. Worswick,* 187 Cal. 674, 203 Pac. 999 (1922), construed the Desert Land Act as applicable only to Desert Lands, that is to say, that the broad language reserving all waters on non-navigable lakes and streams for appropriation meant only for appropriation for use on lands acquired under the Desert Land Act. We suggest that this construction of the Desert Land Act is too narrow and not in harmony with the decisions of this court above cited.

The Ninth Circuit Court of Appeals in the majority opinion in the instant case cited, as opposed to the Oregon court's construction of the Desert Land Act, the following decisions of the Supreme Court of the State of Washington: *Still v. Palouse Irrigation & Power Co.,* 64 Wash. 606, 117 Pac. 466 (1911), and *Bernot v. Morrison,* 81 Wash. 538, 559, 143 Pac. 104, 111, Ann. Cas. 1916D 290 (1914). While the Washington court did deny the claim that the Desert Land Act protected the defendants in those cases in the rights claimed, we submit that neither of the cases involved any question justifying a construction of the Desert Land Act; that each of them involved and should have been decided upon the sole ground of no right to

commit a nuisance with water. In each of the cases complaint was made because lower appropriators undertook to dam the outlet of lakes and back the water upon the land of adjoining riparian owners so as to flood those lands and destroy the crops growing thereon. Clearly the Desert Land Act did not pretend to authorize any such invasion of the property rights of another, and just as clearly the cases were and should have been decided upon the sole ground of abuse of water, without reference to the Desert Land Act.

We think a fair statement is that up to this time the Supreme Courts of the states of Oregon and South Dakota have construed the Desert Land Act to eliminate riparian rights as to lands in those states patented after March 3, 1877; that the Supreme Court of California has construed the act to apply only to lands acquired under the Desert Land Act; and that this court has ruled that the Desert Land Act does contain a modification of the riparian doctrine, but has not yet decided the extent of that modification.

We believe the construction of that act by the Supreme Court of Oregon is correct. It is true that the act is dealing with the reclamation of desert lands, but it is also true that the body of a Congressional determines its scope. The Desert Land Act, after providing for the filing upon desert land by the citizen, contains a proviso requiring the right to the use of water for reclamation of the land to depend upon prior appropriation, and to be limited to the amount actually needed for the reclamation. The language of the proviso, "Provided, however, that the right to the use of water by the person conducting the same, on or to any tract of desert land of 640 acres, shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually ap-

propriated, and necessarily used for the purpose of irrigation and reclamation," definitely eliminates a riparian claim of water for lands acquired under the Desert Land Act. Nothing further would be needed to confine water rights to the doctrine of appropriation measured by necessity with respect of lands acquired under this act. Thus far the proviso clearly does away with riparian claims on the lands filed upon under the Desert Land Act, but the proviso continues with this significant language: "And all surplus water over and above such actual appropriation and use, together with the waters of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights." This language, we submit, does very much more than to eliminate riparian rights from lands acquired under the Desert Land Act. The words down to the first comma reserve from a claim of riparian rights all water in excess of that required to reclaim the desert land filed upon, and, but for the words following the word "use" down to and including the word "navigable," there would be plausible support for the contention that the reservation of riparian rights applied only against the desert land claimant. The proviso thus modified would read: "That all surplus water over and above such actual appropriation and use shall remain and be held free for the appropriation and use," etc. But, we submit, the Congress did not so limit the legislation, but provided that not only water in excess of that needed for the reclamation of desert lands but also "the water of all lakes, rivers and other sources of water supply upon the *public lands* and not navigable," shall remain free for appropriation. This language is all-inclusive, not at all

necessary to reserve water on desert lands or to reserve water from the riparian claims of desert lands, and means something more than merely the reclamation of desert lands. That meaning, we submit, is made clear by the last words of the proviso, that the waters of all lakes, rivers and other sources of water supply upon the *public lands* and not navigable, shall remain and be held free for the appropriation and use "of the public for irrigation, mining and manufacturing purposes." The fact that this reservation is not confined to water for irrigation or for the reclamation of desert lands, but is made for all purposes for which water is useful, seems to us significant. The reservation is not limited to desert lands, it embraces all public lands. The reservation is amply broad to eliminate riparian rights in the Desert Land states as to patents issued after March 3, 1877.

The debates in Congress indicate that the interpretation of the Desert Land Act by the Supreme Court of Oregon, at least in the result reached by that court, is correct.

The Desert Land Act (H.R. 4261) was reported to the Senate by Senator Booth, chairman of the Public Lands Committee, and called up for consideration by Senator Sargent February 27, 1877 (*Congressional Record, p. 1965*). The Committee's report, among other things said:

> "It is believed that by far the larger portion of land bordering on the streams, where sufficient moisture exists for cultivation and where irrigation is cheap and easy, have been appropriated; but the provisions of this bill will enable settlers by combined efforts to construct more extensive works and reclaim a class of lands that are now absolutely

worthless. * * * A system has already grown up in the states and territories included in the bill, created by custom and legislation, and sanctioned by the courts, which recognizes priority of appropriation as the rule governing the right to the use of water and limits such appropriation to the water actually used, leaving the surplus free to other appropriators, and thus avoiding waste and preventing monopoly."

In the course of a running debate, Senator Sargent said (*Congressional Record, p. 1966*):

"For instance, we have found * * * the cattlemen go under a fictitious compliance with the terms of the preemption law and take their land along the margin of the streams, and then there is no possibility of getting water to the back country at all. I want to provide so that persons in the back country may go above such a person, for instance, on Humboldt River, and take the water out and conduct it into the back lands."

Senatory Oglesby, of the Public Lands Committee, submitted an amendment consisting of the proviso under discussion here, but omitting reference to manufacturing, in the course of which he made a statement of objections to permitting anyone taking land fronting on a stream and thereby obtaining control of the wafer (*Congressional Record, p. 1968*), and thereafter explained that the purpose of the bill was to make the water free for all uses (*p. 1969*). Finally, the House failing to agree with Senate amendments, there was a conference and in conference the word "manufacturing" was added to the uses for which water was reserved, and the proviso adopted as it now appears in the bill (*Congressional Record, p. 2156*).

Analyzing this record, we find that the committee understood that the act was making appropriation the sole method of acquiring water rights on the public land, and that Senator Sargent, who was in charge of the bill, expressly stated that the purpose of it was to prevent settlers under *other land laws* from acquiring riparian rights that would tie up the water. Congress proposed to end riparian claims as to lands patented after March 3, 1877.

The instant case illustrates why the act touches more than desert lands. Rogue River rises in an area of heavy precipitation, passes through a valley of light precipitation where semi-arid lands require irrigation, and then joins the Pacific Ocean in an area of coastal rains. From Northern California to the British Columbia border this is probably true of other streams. Certainly the Columbia River (navigable for a considerable distance above its mouth) flows through the arid section of Eastern Washington where it is non-navigable, and its waters are used for irrigation and power. It is true of Klamath River, flowing from Eastern Oregon into the Pacific Ocean in Northern California. Construction of the Desert Land Act to limit riparian rights on desert land only would be destructive of its purpose as to such streams as those mentioned. A riparian owner near the Pacific Ocean could prevent use of water in the upper arid section.

**There is presented as to the lands of petitioner in the instant litigation the question whether the ruling of the Oregon Supreme Court in Hough v. Porter, supra, should not be controlling regardless of what this court may determine to be the proper construction of the congressional legislation.**

Beyond doubt all courts must look to this court for an authoritative construction of the Desert Land Act. Furthermore, as to unpatented lands there can be no

question that rights claimed by force of the decisions of a state court must immediately yield to the decisions of this court. (*Calhoun Gold Mining Co. v. Ajax Gold Mining Co.*, 182 U.S. 499, 505, 45 L. ed. 1200, 1205 (1901).) That decision, however, was dealing with *public* land upon which mining claims had been filed and as to which there were conflicting claims under acts of Congress. This court properly ruled that regardless of numerous contrary decisions by the Supreme Court of Colorado, uniformity of mining rights demanded that claimants to these mineral lands abide by the ruling of this court.

In the case at bar, however, we are not dealing with rival claims to unpatented lands. The lands of petitioner were patented by the United States April 20, 1885, and at once became subject to the laws of real property of the State of Oregon. In the gradual development of a policy to govern water rights in the State of Oregon, the Supreme Court of this state reached the conclusion and definitely decided that lands patented to citizens of this state after March 3, 1877, should not have a claim to water as a riparian. It was for the State of Oregon to determine what its water law should be and to what extent, if at all, it would recognize riparian rights. It concluded that it would not recognize riparian rights to lands patented after March 3, 1877, and has consistently and repeatedly so ruled. Even though its construction of the effect of congressional legislation should be erroneous, is its decision of landed rights or water rights in this state as to property that is no longer a part of the public domain, to be overturned because the reason for the decision may have been erroneous? It seems to us there is involved merely a question of power, that the Supreme Court of Oregon had the power to decide,

regardless of the wisdom or correctness of the reason for the decision.

We cannot follow the apprehension of petitioner that curtailment of riparian rights on lands patented after March 3, 1877, would work havoc to persons owning meadowlands in the eastern part of the United States, who have been enjoying the exercise of the use of their riparian rights on the streams upon which they border, and would find their lands arid and stripped of value (*Pet. Brief 184*). The Desert Land Act is confined to certain of the western states (*Appendix to Pet. Brief 105*) and where water has been applied to a beneficial use by a riparian owner it is just as fully an appropriation of the water as though his land were not riparian, and such use would not be affected by application of the Desert Land Act as we contend.

## IV.

**THE OREGON WATER CODE OF 1909 DID NOT DENY TO PETITIONER EQUAL PROTECTION OF THE LAW NOR TAKE ITS PROPERTY WITHOUT DUE PROCESS OF LAW.**

Section 70 of the Oregon Water Code (*Appendix to petitioner's brief, p. 29*) protects vested rights, but defines vested rights in a riparian owner to be the right to use the amount of water theretofore put to a beneficial use and necessary therefor, carefully protecting the rights that may have been initiated under any of the prior water laws. Petitioner contends that because this act did not give it additional time in which to initiate a right its constitutional rights are invaded.

In approaching this point we call the court's attention to subdivision 6 of Section 70 of the act, which protects any attempt to apply water to a beneficial use under any of the laws existing prior to the time the act was filed in the office of the Secretary of State.

This, we think, would protect any right to which there was any valid claim, providing development was undertaken promptly.

**Equal protection of the laws not denied.**

The Water Code classifies riparian owners into (1) those who have put water to a beneficial use, (2) those who have a claimed right under any prior existing law, and (3) those who are merely riparian to the stream, but have done nothing whatever toward use of the water. The mere fact that such a classification was made does not deny petitioner equal protection of the laws, nor does the fact that those who had made no move toward use of the water were placed in a different class than those who had initiated a right or actually applied the water to a beneficial use, unless this court can say there was no reasonable basis for the Legislature to make such classification: *Fred L. Fox v. Standard Oil Company of New Jersey*, — U.S. — (January 14, 1935); *Nebbia v. People of the State of New York*, 291 U.S. 502, 520, 78 L. ed. 940, 947 (1934); *Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 448, 78 L. ed. 413, 434 (1934); *Charlie Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 63 L. ed. 527, 534 (1919).

We submit that the very great importance of water in the development of the western part of the United States, where on the same stream there will be uses for navigation, floating timber to mills, mining, power and irrigation, was a real basis for classifying claimants into those who had put the water to a beneficial use, those who had a claim based under prior law, and those who merely claimed the right to have the water flow idly by their land.

**The act does not take petitioner's property without due process of law.**

If what we have said in prior subdivisions of this brief is sound, there is no basis for the argument that plaintiff's property was taken without due process because the plaintiff did not have a vested riparian right of the character here claimed. Regardless of those contentions of respondent, we believe petitioner's contention in this respect is not sound. This discussion requires reference again to the Constitution of Oregon, Article XVIII, Section 7, "All laws in force in the Territory of Oregon when this constitution takes effect, and consistent therewith, shall continue in force until altered or repealed." Petitioner contends that the section of the Organic Act of the provisional government providing that justice should be administered according to the course of the common-law meant that the common-law theory of riparian rights was legislated and that this was carried into statehood by the constitutional provision above provided. This claims a great deal for a general provision to conduct proceedings according to the common law, but, accepting without conceding it, we refer the court to the last words of the constitutional provision above quoted—continuing laws in force in the territory "until altered or repealed." We submit that this constitutes a *reservation* of power to change the common-law as to any except those who have taken advantage of the asserted existence of the common-law doctrine of riparian rights. We believe that if the common-law doctrine of riparian rights could reasonably be held to have been imposed upon the people of Oregon by the action of the provisional government relied upon by petitioner, the reservation in the constitutional provision above quoted would permit the state to withdraw that right at any time before claimant had put the water to a beneficial

use. Certainly if there had been a power development or any diversion of the water for a beneficial purpose by the riparian owner, we would have a different question. Until the privilege of using the water had been exercised, we think the claimant had nothing more than a privilege that was subject to withdrawal.

It was thus ruled by the Supreme Court of Arizona in the case of *Boquillas Cattle Co. v. Curtis,* 11 Ariz. 128, 89 Pac. 504, 507 (1907), which was affirmed by this court in 213 U.S. 339, 53 L. ed. 822 (1909). The same court in *Verde Water & Power Co. v. Salt River Valley Water Users Association,* 229 Ariz. 305, 197 Pac. 227 (1921), ruled that the privilege granted by congressional act to impound water in a reservoir site was a mere license subject to withdrawal even after large money had been expended, and this court refused to review the decision (257 U.S. 643, 66 L. ed. 412 (1921).

The rule has been frequently applied with reference to formal contracts with a state or municipality where there was a reserved right to amend or repeal: *Spring Valley Water Works v. Schottler,* 110 U.S. 347, 28 L. ed. 173, 176 (1883); *Tomlinson v. Jessup,* 15 Wall. 454, 21 L. ed. 204, 205 (1872); *Capital City Light & Fuel Co. v. Tallahassee,* 186 U.S. 401, 46 L. ed. 1219 (1901); *Frank C. Thornton v. Thomas J. Duffy, et al,* 254 U.S. 361, 369, 65 L. ed. 304, 309 (1920).

This court has likewise sustained the power of the legislature to withdraw rights granted by prior legislative acts, but not yet exercised: *Greenwood v. Union Freight R.R. Co.,* 105 U.S. 13, 26 L. ed. 961, 963 (1881); *Pearsall v. Great Northern Ry. Co.,* 161 U.S. 646, 40 L. ed. 838, 847 (1895); *Looker v. Maynard, ex rel Dusenbery,* 179 U.S. 46, 45 L. ed. 79 (1900).

Furthermore, the Water Code provides for a penalty for those using water in violation of the provisions of the Code (*Section 66-68; Appendix to petitioner's brief, pp. 28-29*).

This court has ruled that where, in the exercise of a power vested in Congress, it makes unlawful that which was lawful when the right thereto vested, the right can not thereafter be exercised: *Louisville & Nashville R.R. v. Mottley,* 219 U.S. 466, 468, 55 L. ed. 297, 302 (1910). This ruling was re-affirmed in the recent decisions involving the Gold Clause legislation.

**The Legislature could withdraw riparian rights independent of express reserved power.**

We believe the reserved police power of the state is just as broad as a grant of power to Congress. *Hadacheck v. Sebastian,* 239 U.S. 410, 60 L. ed. 356 (1915). This court has repeatedly ruled that there is no vested right in a rule of the common-law: *Funk v. United States,* 290 U.S. 371, 383, 78 L. ed. 369, 376 (1933); *Munn v. People of Illinois,* 94 U.S. 113, 24 L. ed. 77 (1876); *New York Central Ry. v. White,* 243 U.S. 188, 61 L. ed. 667 (1916). This rule has been specifically applied to a withdrawal of riparian rights and complete reversal of the state's position thereon, this court holding that each state has a right to determine what its law on that subject shall be: *Atchison v. Peterson,* 20 Wall. 507, 511, 22 L. ed. 414, 415 (1874); *United States v. Rio Grande Dam & Irrigation Co.,* 174 U.S. 690, 703, 706, 43 L. ed. 1136, 1141, 1142 (1899); *Kansas v. Colorado,* 206 U.S. 46, 86, 51 L. ed. 956, 970 (1906); *Bean v. Morris,* 221 U.S. 485, 55 L. ed. 821 (1911); *Oklahoma v. Texas,* 258 U.S. 574, 596, 66 L. ed. 771, 780, 781 (1922); *State of Connecticut v. Commonwealth of Massachusetts,* 282 U.S. 661, 670, 75 L. ed. 602, 607 (1931); and the right has been as-

serted and exercised by the several western states in reliance upon these decisions of this court, and based upon either a change of the claimed former riparian right by legislative enactment or by constitutional amendment: *Geo. L. Peabody, et al, v. City of Vallejo*, 89 Cal. Dec. 165 (Jan. 31, 1935, not yet in Pacific Reporter). In that case the Supreme Court of California had under consideration for the second time a constitutional amendment putting an end to the ancient common-law doctrine of riparian rights (a doctrine to which the state had become committed in a very early decision). The court held that the State of California has compelte control over water of non-navigable streams and may restrict riparian rights by legislation after such rights are claimed to have attached. The decision was preceded by the case of *Gin S. Chow v. City of Santa Barbara*, 217 Cal. 673, 22 Pac. (2d) 5, 13, 15 (1933), in which the court found that the common-law of England had been adopted by statute, but held that the people had a right to thereafter modify the law even as to rights claimed under such statute.

*Miller v. Letzerich*, 121 Tex. 248, 49 S.W. (2d) 404, 412 (1932).

This case contains a very interesting discussion of both the civil law and the common-law which was adopted in Texas and upholds a change by statute of common-law rights which were then in process of being exercised.

*Yeo v. Tweedy*, 34 N.Mex. 611, 286 Pac. 970 (1930).

Here was involved the right to underground water. The court points out, at page 972 of the Pacific Reporter, that a sweeping general statute adopting the common-law is more a rule of practice and does not

carry into the state law each detailed right of property existing at common-law. The court there upheld an act very similar to the Oregon Water Code, completely codifying the water law of New Mexico, and limiting riparian rights to those put to a beneficial use before the enactment of the Code.

*Reno Smelting Works v. Stevenson,* 20 Nev. 269, 21 Pac. 317, 4 L.R.A. 60, 19 Am. St. Rep. 364 (1889).

This case is of more than usual interest because the plaintiff had actually applied water to a beneficial use, but presented his claim as a riparian owner only. The State of Nevada had adopted in general terms the common-law and the Supreme Court had handed down a decision sustaining the common-law of riparian rights. The Supreme Court of Nevada in an opinion showing great research held that the general adoption of the common-law did not commit the state to an irrevocable policy regarding water rights, that the Supreme Court or the Legislature had a right to reverse that policy, and that even as to the plaintiff, which had put water to a beneficial use, the court would send the case back for the plaintiff to assert his claim under the policy of appropriation that then prevailed in the state. This case and its reasoning is approved by this court in *Funk v. United States,* 290 U.S. 371, 383, 78 L. ed. 369, 376 (1933), where this court writes what might be termed a monograph on the limited meaning of a general adoption of common-law rules of procedure, and upon the right of the state to depart therefrom as conditions justify.

Petitioner has labored at great length in its brief arguing a construction of the Oregon Water Code of 1909 that would make it either (1) inapplicable to an undeveloped claimed riparian right, or (2) would ex-

pressly grant a continuation of such right without development. It is hardly necessary to answer this argument because the statute has been construed adversely to petitioner's contention by the Supreme Court of Oregon. This construction should and probably will be accepted by this court (*Ex parte Tyler*, 149 U.S. 164, 192, 37 L. ed. 689, 697 (1893); *Ennis Water Works v. City of Ennis*, 233 U.S. 652, 658, 58 L. ed. 1139, 1141 (1914)).

The Supreme Court of Oregon definitely decided in the case of *In re Willow Creek*, 74 Or. 592, 608, 621, 622, 144 Pac. 505, 146 Pac. 475 (1915), that the Oregon Water Code of 1909 did limit a claimed riparian right to the amount of water actually put to a beneficial use, and that construction of the statute was again applied in the case of *Re Water Rights of Hood River*, 114 Or. 112, 166, 175, 227 Pac. 1065 (1924).

The argument of petitioner that a different question was involved in the case of *Re Water Rights of Hood River*, because the lands of the Pacific Power & Light Company were acquired from the state, will not be borne out by the record in that case. The Pacific Power & Light Company endeavored to date its right back to statehood upon the contention that Sections 16 and 36 passed to the state at that time and carried with them whatever water rights theretofore existed in the federal government. The question was raised in the case as to whether riparian rights could attach to such land. The Supreme Court held it necessary to and did definitely pass upon the question of riparian rights. The court stated the question in this manner (114 Or., p. 166):

"The main question for determination as to the Pacific Power & Light Company upon this appeal is

as to its claim for water power as a riparian proprietor, that is, what is the nature and extent of the Power Company's right."

Thereafter followed a discussion of the development of the Water Law in Oregon and the definite holding that, although the Power Company asserted it had always claimed as a riparian owner, such rights were cut off (except as to water put to a beneficial use) by the Water Code of 1909.

It would be a work of supererogation for us to argue that in enacting the Water Code of 1909 the Legislature of Oregon was exercising its police power. That is the power upon which a state draws when it passes laws regulating the use of its property. We think this is elementary. Likewise it is clear that the Supreme Court of Oregon was aware that the Code was enacted in exercise of the police power, from the following statement of that court in the case of *In re Willow Creek*, 74 Or. 592, 610, 144 Pac. 505, 146 Pac. 475 (1915):

"It is evident that in the enactment of the Water Code the state, being interested in providing a system for the regulation of the use of the water and for the determination of existing rights, thereby exercised the police power of the state in order to provide a complete system of state control, in the regulation of the diversion and use of the water and a means for having a record made of the rights to the same, for much the same purpose as records of title to real property are provided."

## V.

### NO ACTUAL DAMAGE SHOWN TO JUSTIFY INJUNCTIVE RELIEF.

Petitioner asserts the right to injunctive relief upon two theories, (1) that it has a vested right to the use of the water, and (2) that it has a common ownership of the entire bed of Rogue River at that location.

(1) The first contention begs the question. If petitioner actually has a riparian right to the use of water for power which it did not need to submit to the adjudication of the relative rights to use the waters of Rogue River and which was not withdrawn by the Water Code of 1909, then the right to an injunction follows as a matter of course. The whole argument of petitioner and very much of the citation of authority in petitioner's brief is directed to the fact that vested rights will be protected. *The question is whether petitioner had any vested right.* In this connection we direct attention to the fact that the trial court found that the physical property of petitioner had not been damaged. The decree of the trial court carefully preserved the right of petitioner to have sufficient water flow over its side of the stream to meet its natural needs, which are the recognized riparian rights in this state.

The court made other findings that to us are significant. They are significant because these findings were not challenged in the assignments of error made by petitioner on appeal to the Circuit Court of Appeals. Finding VIII (*R. 71*) recites that the Condor Water & Power Company, a predecessor in interest of petitioner, in 1906 filed a suit to enjoin a predecessor in interest of respondent from building entirely across the stream a dam for power purposes, and in that suit the Condor Company claimed that it needed the water

for uses in development of power, but that neither this company nor any one of its successors in interest down to and including the petitioner had ever made a move to put the water to a beneficial use. This failure to demonstrate a need for the power site can not be met by the statement that petitioner has been in litigation. It was not in litigation from 1911 to 1926 (*R. 391*). The litigation to prevent this *respondent* from constructing its power development was not litigation that would prevent *petitioner* from constructing its power plant if needed, but was litigation instituted by petitioner to prevent respondent from developing its power rights. During all of that time there was nothing to prevent petitioner from developing its power right if it had any. So we say there is no damage, present or prospective, shown by petitioner that would justify an injunction to enjoin the use of the waters of the stream by others. The riparian owner has no property in the water, but merely a usufruct as it passes. (*Atchison v. Peterson*, 20 Wall. 507, 511, 22 L. ed. 414, 415 (1874)).

(2) We think the Act of May 18, 1796 (*1 Stat. 468*) so much cited and relied on by petitioner, will not sustain petitioner's contention that petitioner *owns clear across the bed of Rogue River*, and therefore respondent may not improve its property west of the thread of the stream.

Originally the Act of 1796 applied only to the Northwest Territory. Later by Act of March 3, 1803 (*2 Stat. 235*), a similar provision as to navigable waters was extended to the states south of Tennessee.

The Revised Statutes (2476) applied the rule generally to public lands. This policy of the federal government was never intended to deprive the several public land states of their right and power to deter-

mine the incidents of land ownership. Repeatedly this court has upheld the right of each state to determine such matters.

*Barney v. Keokuk*, 94 U.S. 324, 341, 24 L. ed. 224, 228 (1877).

*Packer v. Bird*, 137 U.S. 661, 672, 34 L. ed. 819, 821 (1891).

*St. Anthony Falls Water Power Co. v. Board of Water Commissioners of the City of Saint Paul*, 168 U.S. 349, 361-364, 42 L. ed. 497, 502, 503 (1897).

*Hudson Water Company v. McCarter*, 209 U.S. 349, 356, 52 L. ed. 828, 832 (1907).

*Brewer-Elliott Oil & Gas Company v. United States*, 260 U.S. 77, 88, 67 L. ed. 140, 146 (1922).

In Oregon the riparian owns to the thread of the stream only.

*Shaw v. Oswego Iron Works*, 10 Or. 371 (1881).

*Micelli v. Andrus*, 61 Or. 78, 85-86, 120 Pac. 737 (1912).

*Wyckoff v. Mayfield*, 130 Or. 687, 689, 280 Pac. 340 (1929).

While a *natural* sudden change in the channel of a stream leaves the old thread the boundary (*1 Wiel, Water Rights* (3d ed.), p. 915), it is unnecessary to discuss the effect on boundaries of an *artificial* change, because the decree in this case carefully requires the waters of Rogue River to be maintained by respondent at an elevation that will require a large volume to flow over petitioner's side of the river bed (*R.* 78) following findings of like nature (*R.* 74). The opinion of the trial court explains that the decree will maintain the thread of the stream (*R.* 65).

The suggestion in the dissenting opinion of Judge Wilbur that respondent be required to pay petitioner for the use of water which petitioner is not ready to use and has not used, is contrary to the entire doctrine of the Oregon water law, both before and after adoption of the Water Code of 1909. As stated by this court in *Atchison v. Peterson, supra,* the riparian owner has only a usufruct in the water. As stated by the Supreme Court of Oregon in an appeal from the adjudication of the waters of this very stream (*In re Rogue River Adjudication,* 120 Or. 237, 240, 251 Pac. 898 (1927)), it has always been the policy of the State of Oregon to permit anyone to use the waters of a stream when others do not need it. To hold that mere ownership of land riparian to a stream would permit the owner to compel payment of tribute from others who have a right to use the water under the policy of the Oregon law, would be contrary to the entire theory of water law as administered in this state.

The suggestion repeatedly made by petitioner that the effect of the Water Code as enforced by the decree of the lower court is to take the property of the petitioner and give it to respondent, is, we submit, unsound and based upon a misconception of the Water Code. That Code did not take the property of anyone and give it to another. It was designed to put an end to *idle* water and to require its development and use as prerequisite to a claim thereto. It gave no rights to anyone, except as those rights were developed by actual use. When it withdrew and refused to recognize riparian claims that had never been exercised, it did not confer the use of that water upon any other person or corporation. The water belonged to the public. That public took back what was its own and granted to all alike the right to acquire the privilege of using that

water by putting it to a beneficial use. That right was extended to petitioner just the same as to respondent, and had petitioner desired to develop power at this point it could have requested a permit to apply the water to that purpose, just as respondent did. This wholesome law, calculated to bring about development of the state's resources and provide an orderly determination of relative rights and a record thereof so this development can proceed, should be sustained.

## CONCLUSION

We submit the decree should be affirmed.

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# APPENDIX

# APPENDIX

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# APPENDIX

## OREGON LAW OF 1864

"An act to establish and regulate quartz mining claims, and in relation to placer claims, town sites, and water-rights in mining camps and to avoid litigation.

"Section 1. That any person or company of persons, establishing a claim on any quartz lead containing gold, silver, copper, tin or lead, or a claim on a vein of cinnabar, for the purpose of mining the same, shall be allowed to have, hold and possess the land or vein with all its dips, spurs and angles, for the distance of three hundred feet in length, and seventy-five feet in width on each side of such lead or vein.

"Section 2. To establish a valid claim, the discoverer or person wishing to establish a claim, shall post a notice on the lead or vein, with name or names attached, which shall protect the claim or claims for thirty days; and before the expiration of said thirty days, he or they shall cause the claim or claims to be recorded as herinafter provided, and describing as near as may be the claim or claims, and their location; but continuous working of said claim or claims, shall obviate the necessity of such record. If any claim shall not be worked for twelve consecutive months, it shall be forfeited, and considered liable to location by any person or persons, unless the owner or owners be absent on account of sickness or in the service of their country in time of war.

"Section 3. Any person may hold one claim by location, as hereinafter provided, upon each lead or vein, and as many by purchase, as the local laws of the miners in the district where such claims are located, may allow; and the discoverer of any new lead or vein, not previously located upon, shall be allowed

one additional claim for the discovery thereof; nothing in this section, shall be so construed as to allow any person, not the discoverer, to locate more than one claim upon any one lead or vein.

"Section 4. Every person or company of persons, after establishing such claim or claims, shall, within one year after recording or taking such claim or claims, work or cause to be worked, to the amount of fifty dollars for each and every claim, and for each successive year shall do the same amount of work, under penalty of forfeiture of said claim or claims, Provided, That any incorporate company owning claims on any lead or vein, may be allowed to work upon any one claim, the whole amount required as above, for all the claims they may own on such lead or vein.

"Section 5. It shall be the duty of the county clerk of any county, upon the receipt of notice of a miners' meeting, organizing a miners' district in said county, with a description of the boundaries thereof, to record the same in a book, to be kept in his office, as other county records, to be called a 'book of record of mining claims'; and upon the petition of parties interested, he may appoint a deputy for such district, who shall reside in said district or its vicinity, and shall record all mining claims and water rights, in the order in which they are presented for record, and shall transmit a copy of such record, at the end of each month, to the county clerk, who shall record the same in the above-mentioned book of record, for which he shall receive one dollar for each and every claim. It shall further be the duty of said county clerk to furnish a copy of this law to his said deputy, who shall keep the same in his office, open at all reasonable times for the inspection of all persons interested therein.

"Section 6. *Miners shall be empowered to make local laws in relation to the possession of water rights, the possession and working of placer claims, and the survey and sale of town lots in mining camps, subject to the laws of the United States.*

"Section 7. *That ditches used for mining purposes, and mining flumes permanently affixed to the soil, be and they are hereby declared real estate, for all intents and purposes whatever.*

"Section 8. That the laws relative to the sale and transfer of real estate, and the application of the liens of mechanics and laborers therein, be and they are hereby made applicable to said ditches and flumes, Provided, That all interests in mining claims, known as placer or surface diggings, may be granted, sold and conveyed by bill of sale, and delivery of possession, as in cases of the sale of personal property; Provided, further, That the bills of sale or conveyances executed on the sale of any placer or surface mining claim, shall be recorded within thirty days after the date of such sale, in the office of the county clerk of the county in which such sale is made, in a book to be kept by the county clerk for that purpose to be called the record of conveyances of mining claims.

"Section 9. Mortgages of interests in placer or surface mining claims shall be executed, acknowledged, recorded and foreclosed as mortgages of chattels.

"Section 10. The county clerk shall be entitled to a fee of one dollar each, for every conveyance or mortgage recorded under the provisions of this act." *(Deady's Code, p. 812.)*

"An act to provide for the appropriation of water from the lakes and running streams of the State of Oregon for purposes of irrigation and supplying water for household and domestic use, and for watering livestock upon dry lands, and making charges for water supplied; allowing the condemnation of lands for right of way; prescribing the manner of making appropriations and effecting condemnation of lands; allowing the condemnation of rights of riparian proprietors arising from their location; regulating the manner of constructing and operating ditches or canals, flumes, reservoirs, distributing ditches and feeders; prescribing right of recovery of damages resulting from the construction and operation of the same; securing the protection of highways; granting a lien upon crops raised by irrigation, and providing for its enforcement; declaring all such ditches or canals or flumes to be real estate, and providing for conveyances of the same; providing punishment for trespassers; prescribing the manner of settlement of conflicting rights by suit, and granting right of way over State lands.

"Be it enacted by the Legislative Assembly of the State of Oregon:

"Section 1. That the use of the water of the lakes and running streams of the State of Oregon for general rental, sale or distribution for purposes of irrigation and supplying water for household and domestic consumption and watering livestock upon dry lands of the State, is a public use, and the right to collect rates or compensation for such use of said water is a franchise. A use shall be deemed general within the purview of this act when the water appropriated shall be supplied to all persons whose lands lie adjacent to

or within reach of the line of the ditch or canal or flume in which said water is conveyed, without discrimination other than priority of contract, upon payment of charges therefor, as long as there may be water to supply.

"Section 2. A corporation organized for the construction and maintenance of a ditch or canal or flume for general irrigation purposes, and other purposes above described, may appropriate and divert water from its natural bed or channel and condemn right of way for its ditch or canal or flume, and may condemn the rights of riparian proprietors upon the lake or stream from which such appropriation is made, upon complying with the terms of this act. Such corporation shall also have the right to condemn lands for the sites of reservoirs for storing water for future use, and for rights of way for feeders carrying water to such reservoirs, and for ditches carrying the same away, and distributing ditches, and shall have the right to take from any running stream in this State and store away any water not needed for immediate use by any person having a superior right thereto.

"Section 3. Such corporation may enter upon any land for the purpose of locating a point of diversion of the water intended to be appropriated, and upon any land lying between such point and the lower terminus of its proposed ditch or canal or flume for the purpose of examining the same and of locating and surveying the line of such ditch or canal or flume, together with the lines of necessary distributing ditches and feeders for reservoirs, and to locate and determine the sites for reservoirs for storing water.

"Section 4. When a point of diversion shall have been selected, such corporation shall post in a conspicuous place thereat a notice in writing containing a

statement of the name of the ditch or canal or flume and of the owner thereof, the point at which its headgate is proposed to be constructed, a general description of the course of said ditch or canal or flume, the size of the ditch or canal or flume, in width and depth, the number of cubic inches of water by miner's measurement under a six-inch pressure intended to be appropriated, and the number of reservoirs, if any.

"Section 5. Within ten days from the date of posting such notice, such corporation shall file for record in the office of the county clerk or recorder of conveyances, as the case may be, of the county in which said ditch or canal or flume, distributing ditches, reservoirs and feeders, are situated, a similar notice, and at the same time shall file a map showing the general route of said ditch or canal or flume; and in case said ditch or canal or flume, distributing ditches, reservoirs and feeders shall not lie wholly in one county, such notice and map shall be filed in the office of the county clerk or recorder of conveyances of each county in which any portion of said ditch or canal, flume, distributing ditches, reservoirs and feeders may be situated. Within sixty days from the completion of such ditch or canal or flume such corporation shall in like manner file a map of definite location of said ditch or canal or flume by legal subdivisions of the land traversed thereby, in case it is surveyed with the points of location of reservoirs, if any, designated thereon. It shall be the duty of every county clerk or recorder of conveyances, immediately upon the filing of such notice in his office, to record the same in a book kept for such purpose, and he shall file and preserve such maps among the records of his office.

"Section 6. When such corporation shall have acquired the right to appropriate water in the manner

hereinbefore provided, it may proceed to condemn lands and premises necessary for right of way for its ditch or canal or flume, and likewise for its distributing ditches and feeders and for sites for reservoirs; but right of way for the main line of said ditch or canal or flume shall not exceed one hundred feet in width, and for each distributing ditch or feeder thirty feet in width, and for a site for each reservoir twenty acres from one owner or for every ten thousand inches of water, miner's measurement, as aforesaid, or fraction thereof over half, of the capacity of the main ditch or canal or flume for every twenty miles of its length.

"Section 7. Whenever any corporation, authorized as hereinbefore provided to appropriate water and to construct and maintain a ditch or canal or flume for irrigation purposes, and for the purpose of supplying water for household and domestic use and for watering stock, and to condemn lands for right of way and sites for reservoirs, is unable to agree with the owner of such lands as to the compensation to be paid therefor, or if such owner be absent from the State or incapable of acting, such corporation may maintain an action in the circuit court of the county in which the lands sought to be appropriated or some portion thereof are situated, for the purpose of having such lands appropriated to its use, and for determining the compensation to be paid to such owner therefor. The proceedings in such action to final determination shall be the same as those prescribed by title III of Chapter XXXII of the Miscellaneous Laws of Oregon, as found in Volume 2 of the Annotated Laws of Oregon, compiled by W. Lair Hill.

"Section 8. Such corporation may also maintain an action for the condemnation and appropriation of the right to the flow of water in any stream from which it

proposes to divert water below the point of diversion vested in the owners of lands lying contiguous to such stream by virtue of their location. Such actions shall be brought in the county where the lands to be affected or some portion thereof are situated, and the manner of procedure therein shall be similar to that prescribed in the preceding section for condemnation of lands; but no person owning lands lying contiguous to any stream shall, without his consent, be deprived of water for household or domestic use, or for the purpose of watering his stock, or of water necessary to irrigate crops growing upon such lands, and actually used therefor.

"Section 9. Within six months from the date of the posting of the notice above prescribed, the corporation proposing to appropriate the water therein mentioned shall commence the actual construction of its proposed ditch or canal or flume, and shall prosecute the same without intermission except as resulting from the act of God, the elements or unavoidable casualty, until the same be completed; and the actual capacity of said ditch or canal or flume, when completed, shall determine the extent of the appropriation, anything contained in the notice to the contrary notwithstanding. Upon a compliance with the provisions of this act, the right to the use of the water appropriated shall relate back to the date of posting said notice.

"Section 10. All existing appropriations of water made for beneficial purposes by any person, corporation or company in accordance with the laws of the United States, or in accordance with the laws of the State of Oregon or the decisions of its supreme court, or the established customs and regulations of the district in which such appropriations have been made, shall be respected and upheld to the extent of the

amount of water actually appropriated, nor shall any existing mill be deprived of its water-power however lawfully acquired, without the consent of its owner; and all controversies respecting rights to water under the provisions of this act shall be determined by the date of the appropriations as respectively made thereunder by the parties.

"Section 11. In case the channel of any natural stream shall become so cut out, lowered, turned aside or otherwise changed from any cause as to prevent any ditch or canal or flume or feeder of any reservoir from receiving the proper inflow of water to which it may be entitled from such natural stream, the corporation owning such ditch or canal, flume, or feeder shall have the right to extend the head of such ditch or canal, flume, or feeder to such distance upon the stream which supplies the same as may be necessary for securing a sufficient flow of water into the same, and for such purpose such corporation shall have the same right to maintain proceedings for condemnation of right of way for such extension as in case of constructing a new ditch, and the priority of right to take water from such stream through any ditch or canal, flume or feeder shall be unaffected in any respect by reason of a change in the place of diversion; provided, no such change shall interfere with the complete use or enjoyment of any other ditch or canal, flume or feeder lawfully constructed. And when from any cause the line of any ditch or canal, flume or feeder, as originally constructed, can no longer be maintained, the corporation owning the same may alter the course thereof, and for such purpose may condemn lands for right of way as in case of original construction.

"Section 12. Whenever any corporation organized as aforesaid shall find it necessary to construct its

ditch or canal, flume, distributing ditches or feeders across the improved or occupied lands of another, it shall select the shortest and most direct route practicable, having reference to cost of construction upon which said ditch or canal, flue, distributing ditches or feeders can be constructed with uniform or nearly uniform grade.

"Section 13. No tract or parcel of improved or occupied land in this State shall, without the written consent of the owner thereof, be subjected to the burden of two or more ditches or canals or flumes constructed under this act for the purpose of conveying water through said property when the same object can be feasibly and practically attained by uniting and conveying all the water necessary to be conveyed through such property in one ditch or canal or flume; and any corporation having constructed a ditch or canal or flume for the purpose hereinbefore provided, shall allow other corporation to enlarge such ditch or canal or flume so as not to interfere with the operations of the corporation owning the same, and use such ditch or canal or flume in common with the corporation owning the same, upon payment to such corporation of a reasonable proportion of the cost of constructing and maintaining such ditch or canal or flume; such corporation shall be jointly liable to any person damaged along the line of common user by reason of the faulty construction of such portion of such ditch or canal or flume, and the corporation securing the use of the same shall be liable to the owner corporation for all damage by it sustained growing out of the enlargement of said ditch or canal or flume or the increased volume of water turned therein. Before proceeding to secure the right to make use of any portion of a ditch or canal or flume, the corporation seeking to secure

the same shall execute and deliver to the owner corporation a bond with sufficient sureties, in an amount equal to the original cost or construction and the estimated cost of enlargement of the portion of said ditch or canal or flume sought to be subjected to a double use, conditioned for the payment on demand to the owner corporation of a reasonable proportion of the original cost of construction of such portion of said ditch or canal or flume and of the cost of enlargement thereof, together with a reasonable proportion of the cost of its maintenance as enlarged, and of all damages that may at any time accrue to the owner corporation, and for which it shall have a right of recovery against said other corporation by reason of the provisions of this section; provided, that in case the corporation owner of said ditch, flume or canal shall object to the amount or sufficiency of the sureties on such bond, it shall serve upon the corporation desiring to use such ditch, flume or canal, within ten days after receiving said bond, a notice specifying particularly the objections thereto, and the sufficiency of the sureties or the amount of the bond shall be determined by the judge of the circuit court of the county where said ditch, canal or flume is situated, and said judge may hear evidence at chambers in relation.

"Section 14. Any corporation constructing a ditch or canal, flume, distributing ditches or feeders, under the provisions of this act, may make use of natural depressions in the earth along the line thereof to all intents and purposes as parts of said ditch or canal, flume, distributing ditches or feeders; and it may conduct the water appropriated by it along the channel of any natural stream, but not so as to raise the water thereof above ordinary high-water mark, and may take the same out again at any point desired without re-

gard to the prior rights of others to water from said stream; but due allowance shall be made for evaporation and scapage (escapement).

"'Section 15. Every corporation constructing a ditch or canal or flume under the provisions of this act shall be required to erect and keep in good repair a head-gate at the head of its ditch or canal or flume, which, together with the necessary embankments, shall be of sufficient height and strength to control the water at all ordinary stages. The frame work of such head-gate shall be of timber not less than four inches square, and the bottom, sides and gate or gates shall be of plank not less than two inches in thickness.

"Section 16. Every corporation constructing a ditch or canal, flume or reservoir under the provisions of this act, shall be liable for all damages done to the persons or property of others arising from leakage or overflow of water therefrom growing out of want of strength in the banks or walls, or negligence or want of care in the management of said ditch or canal, flume or reservoir; provided, that damage resulting from extraordinary and unforeseen action of the elements, or attributed in whole or in part to the wrongful interference of another with said ditch or canal, flume or reservoir, which may not be known to said corporation for such length of time as would enable it by the exercise of reasonable efforts to remedy the same, shall not be recovered against said corporation.

"Section 17. Any corporation constructing a ditch or canal or flume, under the provisions of this act, across any public highway or public traveled road shall put a good, substantial bridge not less than fourteen feet in breadth over such ditch or canal or

flume where it crosses said highway or road. Travel shall not be suspended by the construction of such ditch or canal or flume, and such bridge shall be completed within three days from the time said highway or road is intersected. In case such bridge is not so constructed and completed, it shall be the duty of the road supervisor of the road district in which the point of intersection is situated to construct said bridge, and he shall bring an action in his own name as supervisor for the use and benefit of his road district in any court of competent jurisdiction to recover the expense of constructing said bridge, and in such action, in addition to the costs and disbursements provided by statute, he shall recover such sum as the court, or justice, if the action be brought in a justice's court, may adjudge to be reasonable as attorney fees in said action. Appeals may be taken in such cases as in other actions.

"Section 18. Every corporation constructing a ditch or canal or flume under the provisions of this act, shall carefully keep and maintain the embankments and walls thereof, and of any reservoir constructed to be used in conjunction therewith, so as to prevent the water from wasting and from flooding or damaging the premises of others; and it shall not divert at any time any water for which it has not actual use or demand.

"Section 19. Such corporation may acquire the right of way across lands lying contiguous to its ditch or canal or flume, for distributing ditches in the manner hereinbefore provided, but it shall not be compelled so to do nor to construct distributing ditches upon any lands for the use of the owners thereof. But when any person shall construct a distributing ditch to the line of right of way for the ditch or canal or flume at any practicable point, and shall tender to

such corporation the rates usually charged consumers of water along the line of said ditch or canal or flume, for any amount of water said corporation may have in its ditch or canal or flume, or may have the right and ability to appropriate above the amount already sold, said corporation shall connect such distributing ditch with its ditch or canal or flume and turn therein the amount of water for which tender is made, and if it shall fail or refuse so to do, it shall be liable to such person for all loss or damage sustained by reason of the failure to procure such water. Such corporation shall not be liable for any loss or damage sustained by any person by reason of the defective construction or careless operation of distributing ditches not by it constructed or operated, and not occasioned in whole or in part by its wrongful or negligent act.

"Section 20. Any corporation acting under the provisions of this act which shall supply water to any person for the irrigation of crops, shall have a lien upon all crops raised by the use of such water for the reasonable value of the water supplied, which lien shall be a continuing one and shall bind said crops after as well as before the same have been gathered, and without record shall be preferred to all other liens or encumbrances upon said crops whatever. Such liens may be enforced by a suit in equity.

"Section 21. All ditches or canals and flumes permanently affixed to the soil, constructed under the provisions of this act, are hereby declared to be real estate, and the same or any interest therein shall be transferred by deed only, duly witnessed and acknowledged. The vendee of the same, or any interest therein, at any stage shall succeed to all the rights of his vendor and shall be subject to the same liabilities during his ownership.

"Section 22. The right to appropriate money (water) hereby granted may be lost by abandonment; and if any corporation constructing a ditch or canal or flume under the provisions of this act shall fail or neglect to use the same for the period of one year at any time it shall be taken and deemed to have abandoned its appropriation, and the water appropriated shall revert to the public and be subject to other appropriations in order of priority. But the question of abandonment shall be one of fact to be tried and determined as other questions of fact.

"Section 23. Any person who shall knowingly and wilfully cut, dig, break down or open any gate, bank, embankment or side of any ditch, canal, flume, feeder or reservoir constructed under the provisions of this act, the property of another, with intent maliciously to injure the owner of such property, or any other person, or for his or her own gain, by unlawfully causing the water contained in said ditch, canal, flume, feeder or reservoir to run or pour thereout with intent of stealing the same or appropriating it for his or her own gain, profit, benefit or advantage, without the consent of the owner thereof, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than ten nor more than three hundred dollars, or by imprisonment in the county jail not less than one month nor more than one year. Justices' courts shall have jurisdiction of all prosecutions arising under this section. The person so trespassing shall also be liable for all damage caused by his act to the owner of said property or any person injured by his wrongful act.

"Section 24. In any suit which may hereafter be commenced for the protection of rights to water acquired under the provisions of this act, the plaintiff

may make any or all persons who have diverted water from the same stream or source parties to such suit, and the court may in one decree determine the relative priorities and rights of all parties to such suit. Any person claiming a right on said stream or source, not made a party to such suit, may become such on application to the court, when it is made to appear that he is interested in the result of the suit, and may have his right determined, and the court may, at any stage, on its own motion, require any or all persons having or claiming rights to water on said stream or source, to be brought in and made parties to said suit when it appears that a complete determination of the issue involved cannot be made without the presence of such person or persons.

"Section 25. The right of way, to the extent hereinbefore specified, for the ditches or canals, flumes, distributing ditches and feeders of any corporation appropriating water, under the provisions of this act, across any and all lands belonging to the State of Oregon and not under contract of sale, is hereby granted.

"Section 26. This act may at any time be amended by the legislative assembly, and commissioners for the management of water rights and the use of water may be appointed, and rates for the use of water may be fixed by the legislative assembly or by such commissioners; but rates shall not be fixed lower than will allow the net profits of any ditch or canal or flume or system thereof to equal the prevailing legal rate of interest on the amount of money actually paid in and employed in the construction and operation of said ditch or canal or flume or system thereof.

"Section 27. Inasmuch as the question of conflicting claims to the appropriation and use of the water of the streams and lakes of this State, for irrigation purposes and the other purposes hereinbefore enumerated, is a vexed one and should be speedily settled, this act shall take effect and be in force from and after its approval by the Governor.

"Filed in the office of the Secretary of State February 18, 1891." *(Laws 1891, p. 52).*

## OREGON LAWS 1893

"An act to govern the priority of right to waste, spring, and seepage waters, defining the rights of owners of springs and seepage waters, authorizing riparian owners to employ wheels, pumps and other machinery for lifting water for irrigation, and declaring what uses of water shall have preference.

"Be it enacted by the Legislative Assembly of the State of Oregon:

"Section 1. That all ditches now constructed, or hereafter to be constructed, for the purpose of utilizing the waste, spring, or seepage waters of the state, shall be governed by the same laws relating to priority of right as those ditches constructed for the purpose of utilizing the waters of running streams; provided, that the person upon whose lands the seepage or spring waters first arise, shall have the right to the use of such waters.

"Section 2. Any person who owns or has the possessory right to any land bordering on any lake or natural stream of water, shall have the right to employ wheels, pumps, hydraulic engines, or other ma-

chinery for the purpose of raising water to the level required for the use of such water in irrigating any land belonging to such owner; provided, that the use of such water shall not conflict with the better or prior right of any other person.

"Section 3. When the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall, subject to such limitations as may be prescribed by law, have the preference over those claiming such water for any other purpose; and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes.

"Filed in the office of the Secretary of State, February 22, 1893." *(Laws 1893, p. 150.)*

## OREGON LAW 1899

"An act to provide for the appropriation of water from the lakes and running streams of the state of Oregon for the purpose of developing the mineral resources of the state and for other purposes, and supplying water for that and other purposes; allowing the condemnation of lands for right of way for ditches, flumes, canals and pipe lines for conveying such water and reservoirs for the storage of same; prescribing the manner of making appropriations and effecting the condemnation of lands; allowing the condemnation of rights of riparian proprietors arising from their location; regulating the manner of constructing and operating such ditches, canals, flumes, reservoirs and pipe lines; prescribing right of recovery of damages resulting from the construction and operation of the same; securing the protection of highways, and providing punishment for trespassers; prescribing the manner of settlement of conflicting rights by suit, and granting the right of way over state lands.

"Be it enacted by the Legislative Assembly of the State of Oregon:

"Section 1. That the use of the water of the lakes and running streams of the State of Oregon for the purpose of developing the mineral resources of the state and to furnish electrical power for all purposes is declared to be a public and beneficial use and a public necessity, and the right to divert unappropriated waters of any such lakes or streams for such public and beneficial use is hereby granted.

"Section 2. All persons, companies and corporations having title or possessory right to any mineral or other land, shall be entitled to the use and enjoyment of the water of any lake or running stream within the state for mining and other purposes in the developing of the min-

eral resources of the state or to furnish electrical power for any purposes; and such waters may be made available to the full extent of the capacity thereof without regard to deterioration in quality or diminution in quantity, so that such use of the same does not materially affect or impair the rights of prior appropriations.

"Section 3. All such persons companies and corporations may appropriate and divert such waters, and may condemn right of way for ditches, canals, flumes and pipe lines for the carrying of same, and may condemn the rights of riparian proprietors upon the lake or stream from which such appropriation is made, upon complying with the terms of this act. Such persons, companies and corporations shall also have the right to condemn lands for the sites of reservoirs for storing water for future use, and for rights of way for feeders carrying water to such reservoirs, and for ditches, canals, flumes or pipe lines carrying the same away, and shall have the right to take from any lake or running stream in this state and store away any water not previously appropriated or not needed for immediate use by any person having a superior right thereto.

"Section 4. Such persons companies and corporations may enter upon any land for the purpose of locating a point of diversion of the water intended to be appropriated, and upon any land lying between such point and the lower terminus of its proposed ditch, canal, flume or pipe line for the purpose of examining the same and of locating and surveying the line of such ditch, canal, flume or pipe line, together with the line of necessary distributing ditches and feeders for reservoirs, and to locate and determine the site for reservoirs for storing water.

"Section 5. When a point of diversion shall have been selected, such appropriator shall post in a conspicuous place thereat a notice in writing containing a statement of

the name of the ditch, canal, flume or pipe line and of the owner thereof, the point at which its headgate is proposed to be constructed, a general description of the course of said ditch, canal, flume or pipe line, the size or dimensions of the same in width, and depth, the number of cubic inches of water (by miners' measurement under a six-inch pressure) intended to be appropriated, and the number of reservoirs, if any.

"Section 6. Within ten days from the date of posting such notice, such appropriator shall file for record in the office of the county clerk or recorder of conveyances, as the case may be, of the county in which said ditch or canal or flume or pipe line, distributing ditches, reservoirs and feeders are situated, a similar notice, and at the same time shall file a map showing the general route of said ditch or canal or flume or pipe line; and in case said ditch or canal or flume or pipe line, distributing ditches, reservoirs and feeders shall not lie wholly in one county, such notice and map shall be filed in the office of the county clerk or recorder of conveyances of each county in which any portion of said ditch or canal, flume, pipe line, distributing ditches, reservoirs and feeders may be situated. Within sixty days from the completion of such ditch or canal or flume or pipe line such appropriator shall in like manner file a map of definite location of said ditch or canal or flume or pipe line, by legal subdivisions of the land traversed thereby in case it is surveyed, with the points of location of reservoirs, if any, designated thereon. It shall be the duty of every county clerk or recorder of conveyances, immediately upon the filing of such notice in his office, to record the same in a book kept for such purpose, and he shall file and preserve such maps among the records of his office.

"Section 7. When such person, company or corporation shall have acquired the right to appropriate water in the manner hereinbefore provided, it may proceed to condemn

lands and premises necessary for right of way for its ditch or canal or flume or pipe line, and likewise for its distributing ditches and feeders and for sites for reservoirs; but right of way for the main line of said ditch or canal or flume or pipe line shall not exceed fifty feet in width, and for each distributing ditch or feeder thirty feet in width, and for a site for each reservoir twenty acres from one owner, or for every ten thousand inches of water (miners' measurement as aforesaid), or fraction thereof over half, of the capacity of the main ditch or canal or flume or pipe line for every twenty miles of its length.

"Section 8. Whenever any person, company or corporations authorized as hereinbefore provided to appropriate water and to construct and maintain a ditch or canal or flume or pipe line for mining purposes or to furnish electrical power for any purpose, and to condemn lands for right of way and sites for reservoirs, is unable to agree with the owner of such lands as to compensation to be paid therefor, or if such owner be absent from the state or incapable of acting, such person, company or corporation may maintain an action in the circuit court of the county in which the lands sought to be appropriated or some portion thereof are situated, for the purpose of having such lands appropriated to its use and for determining the compensation to be paid to such owner therefor. The proceedings in such action, to final determination shall be the same as those prescribed by title III of chapter XXXII of the miscellaneous laws of Oregon, as found in volume II of the annotated laws of Oregon, compiled by W. Lair Hill.

"Section 9. Such persons, companies and corporations may also maintain an action for the condemnation and appropriation of the right to the flow of water in any stream from which it proposes to divert water below the point of diversion vested in the owners of lands lying contiguous to such stream by virtue of their location. Such action shall be brought in the county where the—

"Section 10. Within six months from the date of the posting of the notice above prescribed, the persons, companies and corporations proposing to appropriate the water therein mentioned shall commence the actual construction of their or its proposed ditch or canal or flume or pipe line, and shall prosecute the same without intermission (except as resulting from the act of God, the elements or unavoidable casualty) until the same be completed; and the actual capacity of said ditch or canal or flume or pipe line when completed shall determine the extent of the appropriation, anything contained in the notice to the contrary notwithstanding. Upon a compliance with the provisions of this act, the right to the use of the water appropriated shall relate back to the date of posting said notice.

"Section 11. All existing appropriations of water made for beneficial purposes by any persons, corporation or company, in accordance with the laws of the United States or in accordance with the laws of the State of Oregon or the decisions of the supreme court, or the established customs and regulations of the district in which such appropriations have been made, shall be respected and upheld to the extent of the amount of water actually appropriated, nor shall any existing mill be deprived of its water power, however lawfully acquired, without the consent of its owner; and all controversies respecting rights to water under the provisions of this act shall be determined by the date of the appropriations as respectively made thereunder by the parties.

"Section 12. In case the channel of any natural stream shall become so cut out, lowered, turned aside or otherwise changed, from any cause, as to prevent any ditch or canal or flume or pipe line or feeder of any reservoir from receiving the proper inflow of water to which it may be entitled from such natural stream, the persons, companies or corporations owning such ditch or canal or pipe line, flume or feeder shall have the right to extend the head of

such ditch or canal or pipe line, flume or feeder to such distance upon the streams which supplies the same as may be necessary for securing a sufficient flow of water into the same; and for such purpose such persons, companies or corporations shall have the same right to maintain proceedings for condemnation of right of way for such extension as in case of constructing a new ditch, and the priority of right to take the water from such stream through any ditch or canal or pipe line, flume or feeder shall be unaffected in any respect by reason of a change in the place of diversion; provided, no such change shall interfere with the complete use or enjoyment of any other ditch or canal, pipe line, flume or feeder lawfully constructed. And when from any cause the line of any ditch or canal, pipe line, flume or feeder along the line of common user, by reason of the faulty construction of such portion of such ditch, canal, flume or pipe line and the persons, companies or corporations securing the use of the same shall be liable to the owner persons, companies or corporations for all damages by it sustained growing out of the enlargement of said ditch, canal, flume or pipe line, or the increased volume of water turned therein. Before proceeding to secure the right to make use of any portion of the ditch, canal, flume or pipe line, the persons, companies or corporations seeking to secure the same shall execute and deliver to the owner persons, companies or corporations a bond with sufficient sureties in an amount equal to the original cost of construction and the estimated cost of enlargement of the portion of said ditch, canal, flume or pipe line, sought to be subjected to a double use, conditional for the payment on demand to the owner persons, companies or corporations of a reasonable proportion of the original cost of construction of such portion of said ditch, canal, flume or pipe line and of the cost of enlargement thereof, together with a reasonable proportion of the cost of its maintenance as enlarged and of all

damages that may at any time accrue to the owner persons or companies or corporations and for which it shall have a right of recovery against said other persons, companies or corporations by reason of the provisions of this section; provided, that in case the persons, companies or corporations owning said ditch, canal, flume or pipe line shall object to the amount or sufficiency of the sureties on such bond it shall serve upon the corporations, companies or persons desiring to use such ditch, canal, flume or pipe line within ten days after receiving said bond a notice specifying particularly the objections thereto, and the sufficiency of the sureties or the amount of the bond shall be determined by the judge of the circuit court of the county where said ditch, canal, flume or pipe line is situated, and said judge may hear evidence at chambers in relation ( * * * ) as originally constructed can no longer be maintained, the persons, companies or corporations owning the same may alter the course thereof and for such purpose may condemn lands for right of way as in case of original construction.

"Section 13. Whenever it becomes necessary to construct any ditch, canal, flume, pipe line, distributing ditches or feeders across the improved or occupied lands of another, under the provisions of this act, such persons, companies or corporations shall select the shortest and most direct route practicable, having reference to cost of construction, upon which said ditch, canal, flume, pipe line, distributing ditches or feeders can be constructed with uniform or nearly uniform grade.

"Section 14. No tract or parcel of improved or occupied land in this state shall, without the written consent of the owner thereof, be subjected to the burden of two or more ditches or canals, flumes or pipe lines constructed under this act for the purpose of conveying water through said property when the same object can be feasibly and prac-

tically attained (by) uniting and conveying all the water necessary to be conveyed through such property in one ditch, canal, flume or pipe line, and any persons, companies or corporations having constructed a ditch, canal, flume or pipe line for the purpose hereinbefore provided shall allow any other persons, companies or corporations to enlarge such ditch, canal, flume or pipe line, so as not to interfere with the operations of the persons, companies or corporations owning the same, and use such ditch, canal, flume or pipe line in common with the persons, companies or corporations owning the same, upon payment to such persons, companies or corporations of a reasonable proportion of the cost of constructing and maintaning such ditch, canal, flume or pipe line. Such persons, companies or corporations shall be jointly liable to any person damaged.

"Section 15. In constructing a ditch, canal, flume or pipe line, distributing ditches or feeders, under the provisions of this act, the owner or owners thereof may make use of natural depressions in the earth along the line thereof to all intents and purposes as parts of said ditch, canal, flume or pipe line, distributing ditches or feeders; and it may conduct the water appropriated by it along the channel of any natural stream, but not so as to raise the water thereof above ordinary high-water mark, and may take the same out again at any point desired without regard to the prior rights of others to water from said stream, but due allowance shall be made for evaporation and seepage.

"Section 16. The owner or owners of every ditch, canal, flume or pipe line constructed under the provisions of this act shall be required to erect and keep in good repair a headgate at the head of its ditch, canal, flume or pipe line, which, together with the necessary embankments, shall be of sufficient height and strength to control the water at all ordinary stages. The framework of such headgate

shall be of timber not less than four inches square, and the bottom, sides and gate or gates shall be of plank not less than two inches in thickness.

"Section 17. The owner or owners of every ditch, canal, flume or pipe line constructed under the provisions of this act shall be liable for all damages done to the persons or property of others, arising from leakage or overflow of water therefrom growing out of want of strength in the banks or walls, or negligence or want of care in the management of said ditch, canal, flume or pipe line or reservoir; provided, that damage resulting from extraordinary and unforeseen action of the elements, or attributed in whole or in part to the wrongful interference of another with said ditch, canal, flume, pipe line or reservoir, which may not be known to said corporation for such length of time as would enable it by the exercise of reasonable efforts to remedy the same, shall not be recovered against said corporations, companies or persons.

"Section 18. The owner or owners of every ditch, canal, flume or pipe line constructed under the provisions of this act across any public highways or public traveled road shall put a good substantial bridge, not less than fourteen feet in breadth, over such ditch, canal or flume where it crosses said highway or road. Travel shall not be suspended by the construction of said ditch, canal, flume or pipe line, and such bridge shall be completed within three days from the time said highway or road is intersected. In case such bridge is not so constructed and completed, it shall be the duty of the road supervisor of the road district in which the point of intersection is situated to construct said bridge, and he shall bring an action in his own name as supervisor for the use and benefit of his road district, in any court of competent jurisdiction, to recover the expense of constructing said bridge; and in such action, in addition to the costs and disbursements provided by

statute, he shall recover such sum as the court or justice, if the action be brought in a justice's court, may adjudge to be reasonable as attorney fees in said action. Appeals may be taken in such cases as in other actions.

"Section 19. The owner or owners of every ditch, canal, flume or pipe line constructed under the provisions of this act shall carefully keep and maintain the embankments and walls thereof, and of any reservoir constructed to be used in conjunction therewith, so as to prevent the water from wasting and from flooding or damaging the premises of others; and it shall not divert at any time any water for which it has not actual use or demand.

"Section 20. The right to appropriate water hereby granted may be lost by abandonment; and if any persons, companies or corporations constructing a ditch, canal, flume or pipe line under the provisions of this act shall fail or neglect to use the same for a period of two years at any time, it shall be taken and deemed to have abandoned its appropriation, and the water appropriated shall revert to the public and be subject to other appropriations in order of priority. But the question of abandonmnt shall be one of fact, to be tried and determined as other questions of fact.

"Section 21. Any person who shall knowingly and willfully cut, dig, break down or open any gate, bank, embankment or side of any ditch, canal, flume or pipe line, feeder or reservoir constructed under the provisions of this act, the property of another, with intent maliciously to injure the owner or owners of such property or any other person, or for his or her own gain, by unlawfully causing the water contained in said ditch, canal, flume, pipe line, feeder or reservoir to run or pour thereout with intent of stealing the same or appropriating it for his or her own gain, profit, benefit or advantage, without the consent of the owner or owners thereof, shall be deemed guilty of a

misdemanor, and upon conviction thereof shall be punished by a fine of not less than $10 nor more than $300, or by imprisonment in the county jail, not less than one month nor more than one year. Justices' courts shall have jurisdiction of all prosecutions arising under this section. The person so trespassing shall also be liable for all damage caused by his or her act to the owner or owners of said property, or any person or persons injured by his or her wrongful act.

"Section 22. In any suit which may hereafter be commenced for the protection of rights to water acquired under the provisions of this act, the plaintiff may make any and all persons who have diverted water from the same stream or source parties to such suit, and the court may in one decree determine the relative priorities and rights of all parties to such suit. Any person claiming a right on said stream or source, not made a party to such suit, may become such on application to the court, when it is made to appear that he is interested in the result of the suit, and may have his right determined; and the court may, at any stage, on its own motion, require any or all persons having or claiming rights to water on said stream or source to be brought in and made parties to said suit, when it appears that a complete determination of the issue involved can not be made without the presence of such person or persons.

"Section 23. The right of way, to the extent hereinbefore specified, for the ditches or canals, flumes, pipe lines, distributing ditches and feeders of any persons, companies or corporations appropriating water under the provisions of this act, across any and all lands belonging to the State of Oregon, and not under contract of sale, is hereby granted.

"Section 24. Inasmuch as this state contains large tracts of mineral lands which can not be successfully worked or

the mineral extracted therefrom without the use of water, and the working of said mining properties will largely increase the wealth of this state; and whereas, the appropriation and use of the water of the streams and lakes of this state for the purpose of developing its mineral resources, and the right to build ditches, canals, flumes, pipe lines and reservoirs in connection with such appropriation and use, and the right to condemn lands necessary for the right of way and maintenance thereof are uncertain and vexed questions and should be speedily settled, therefore, an emergency exists, and this act shall take effect and be in force from and after its approval by the governor.

"Approved February 18, 1899."

*(Laws of 1899, p. 172.)*

## OREGON LAW 1905

"An act to provide for the appropriation of water; granting right of eminent domain to the United States in certain cases; providing for the adjudication of certain water rights; providing for the appointment of a State Engineer, his qualifications, duties, salaries, and the records and fees of his office; providing for hydrographic and topographic surveys; appropriating certain funds; providing for the disposition of certain State lands and rights of way over same; and repealing all acts in conflict with this act.

"Be it enacted by the People of the State of Oregon:

"Section 1. Appropriation of Water. Any person, association, or corporation hereafter intending to acquire the right to the beneficial use of any waters for the reclamation of arid lands, shall post in a conspicuous place at the proposed point of diversion a written or printed notice containing the name of such applicant and the stream or other source of supply of such water, a brief description of the point of diversion and the nature of the beneficial use to which such waters are to be applied, and the exact date of posting, and shall within fifteen days thereafter file in the office of the clerk of the county in which such notice is posted, a duplicate thereof so attested, and shall within thirty days thereafter file in the office of the State Engineer a certified copy of such duplicate as filed in the office of the county clerk, which shall be accompanied by such information, maps, field notes, plans and specifications as may be necessary to show the method of construction. All such maps, field notes, plans, and specifications shall be made from actual surveys and measurements, and shall be retained in the office of the State Engineer; provided, that appropriation of water by the United States shall be made as provided in Section 2.

"Section 2. Appropriation of water by United States. Whenever the proper officers of the United States, authorized by law to construct works for the utilization of water within this State, shall file in the office of the State Engineer a written notice that the United States intends to utilize certain specified waters, the waters described in such notice and unappropriated at the time of the filing thereof shall not be subject to further appropriation under the laws of this State, but shall be deemed to have been appropriated by the United States; provided, that within a period of three years from the date of filing such notice the proper officer of the United States shall file final plans of the proposed works in the office of the State Engineer for his information; and provided further, that within four years from the date of such notice the United States shall authorize the construction of such proposed work. No adverse claims to the use of the water required in connection with such plans shall be acquired under the laws of this State except as for such amount of said waters described in such notice as may be formally released in writing by an officer of the United States thereunto duly authorized, which release shall also be filed in the office of the State Engineer. In case of failure of the United States to file such plans or authorized construction of such works within the respective periods herein provided, the waters specified in such notices, filed by the United States, shall become subject to appropriation by other parties. Notice of the withdrawal herein mentioned shall be published by the State Engineer in a newspaper published and of general circulation in the stream system affected thereby, and a like notice upon the release of any lands so withdrawn, such notices to be published for a period not exceeding thirty days.

"Section 3. Adjudication of Water Rights. In any stream system where construction is contemplated by the United States under the Act of Congress, approved June

17, 1902, and known as the Reclamation Act, the State Engineer shall make a hydrographic survey of such stream system, and shall deliver an abstract thereof, together with an abstract of all data necessary for the determination of all rights for the use of the waters of such system, to the Attorney General of the State. The Attorney General, together with the district attorneys of the district affected by such stream system shall, at the request of the Secretary of the Interior, enter suit on behalf of the State of Oregon, in the name of the State, for the determination of all rights for the use of such waters, and shall diligently prosecute the same to a final adjudication.

"Section 4. Parties and Costs of Suits. In any suit wherein the State is a party, for the determination of a right to the use of the waters of any stream system, all who claim the right to use such waters shall be made parties. When any such suit has been filed the court shall call upon the State Engineer to make or furnish a complete hydrographic survey of such stream system as hereinbefore provided, in order to obtain all data necessary to the determination of the rights involved. The disbursements made in litigating the rights involved in such suit shall be taxed by the court as in other equity suits.

"Section 5. Decrees Adjudicating Water Rights. Upon the adjudication of the rights to the use of the water of a stream system, a certified copy of the decree shall be prepared by the clerk of the court, without charge, and filed in the office of the State Engineer. Such decree shall in every case declare, as to the water right adjudged to each party, whether riparian or by appropriation, the extent, the priority, amount, purpose, place of use, and, as to water used for irrigation, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.

"Section 6. State Engineer, Appointment, Duties, Qualifications, and Salary. A State Engineer, technically qualified and experienced as an hydraulic engineer, shall be appointed by the Governor upon the recommendation of the director of the United States geological survey and confirmed by the Senate. He shall hold office for the term of four years from and after his appointment, unless sooner removed by the Governor for cause, and until his successor shall have been elected and shall have qualified. He shall have general supervision of all the measurements and records of appropriation of waters of the State, and of all surveys and engineering work in which the State may be interested, and for which funds are provided, and shall perform all work in connection therewith. He shall receive a salary of $2,400 per annum and actual and necessary traveling expenses, while away from his office in the discharge of official duties, and shall not engage in private practice. He may employ assistants and purchase materials and supplies necessary for the proper conduct and maintenance of his office and department, in pursuance of appropriations as made from time to time for such purposes. The salaries and expenses of the office of the State Engineer shall be paid at the same time and in the same manner as those of other officers of the State. The office of the State Engineer shall be located at the seat of government in the capitol building. The State Engineer and his authorized assistants and agents, may enter upon any private property for the performance of their respective duties, doing no unnecessary injury thereto. The State Engineer shall prepare and deliver to the Governor on or before November 30th of the year preceding the regular session of the legislature, and at other times when required by the Governor, a full report of the work of his office, including a detailed statement of the expenditures thereof, with such recommendations for legislation as he may deem advisable.

"Section 7. Oath and Bond of State Engineer. Before entering upon the duties of his office the State Engineer shall give bond to the State with sufficient sureties in the sum of $5,000 for the faithful performance of his duties, which bond shall be approved by and filed in the office of the Secretary of State, together with the following oath of office: 'I, ....., being duly sworn, do say that I am the duly appointed State Engineer of the State of Oregon, and that I will faithfully and honestly perform the duties of such office, and that I am not directly or indirectly, pecuniarily or otherwise interested with any person, association, or corporation using or to use any of the waters of the State for any beneficial purpose, in such use thereof, and will not during my term of office become so interested therein, or receive any pecuniary aid or benefit therefrom, and shall not permit any assistant employed by me to be or become so interested or receive any pecuniary aid or benefit from such person, association, or corporation while so employed.'

"Section 8. Records of State Engineer. The records of the office of the State Engineer are public records and shall remain on file in his office and be open to the inspection of the public at all times during business hours. Such records shall show in full all maps, profiles, and engineering data relating to the use of water, and certified copies thereof shall be admissible as evidence in all cases where the original would be admissible as evidence.

"Section 9. Fees of State Engineer. The State Engineer shall receive the following fees, to be collected in advance, and to be paid by him into the general fund of the State Treasury on the last day of March, June, September, and December of each year:

"(a) For filing and recording notice of an appropriation of water, map and field notes of the same, $5.00.

"(b) For blue print copy of any map, drawing, ten cents per square foot or fraction thereof. For other copies of drawings or any data furnished upon application, actual cost of work.

"(c) For certifying to such copies, $1.00 for each certificate.

"(d) For such work as may be required of his office, the fees provided by law.

"Section 10. Hydrographic and Topographic Surveys and Cooperation with the United States Government. The State Engineer shall make hydrographic and topographic surveys and investigations of each stream system and source of water supply in the State, beginning with those most used, obtaining and recording all available data pertaining to the water supply of this State. He is hereby authorized, to cooperate with the agencies of the United States Government engaged in similar surveys and investigations, and in the construction of works for the development and use of the water supply of this State, expending for such purposes any money available for the work of his office.

"For the purpose of making hydrographic and topographic surveys, there is hereby appropriated out of any moneys in the treasury not otherwise appropriated the sum of $2,500 annually for such hydrographic and $2,500 annually for such topographic surveys, such appropriations, however, being contingent upon the United States Government making a like apportionment for such purposes to be expended within the State.

"Section 11. Disposition of State Lands. No lands belonging to the State, within the areas to be irrigated from work constructed or controlled by the United States, or its duly authorized agents, shall hereafter be sold except in conformity with the classification of farm units by the

United States, and the title of such land shall not pass from the State until the applicant therefor shall have fully complied with the provisions of the laws of the United States and the regulations thereunder concerning the acquisition of the right to use water from such works, and shall produce the evidence thereof duly issued. After the withdrawal of lands by the United States for any irrigation project, no application for the purchase of State lands within the limits of such withdrawal shall be accepted, except under the conditions prescribed under that section. Any State lands needed by the United States for irrigation works shall be conveyed to the United States without charge.

"Section 12. Right of Way Over State Lands. There is hereby granted over all the unimproved lands now or hereafter belonging to the State the necessary right of way for ditches, canals, and reservoir sites for irrigation purposes constructed by authority of the United States or otherwise. All conveyances of State land hereafter made shall contain a reservation of such right of way and reservoir sites.

"Section 13. Appropriations. There is hereby appropriated out of the moneys in the general fund of the State Treasury, not othewise appropriated, the sum of five thousand dollars annually, or so much thereof as may be necessary for the salary and expenses of the State Engineer and the services of assistants, and expenses of the office and department of the State Engineer.

"Section 14. But nothing in this act shall be construed as rescinding the cession by the State to the United States of lands, as provided in the act known as House Bill No. 1, passed by the Twenty-third Regular Session of the Oregon Legislature.

"Filed in the office of the Secretary of State, February 22, 1905."

*(Laws of 1905, pp. 401-408.)*

"An act providing for granting franchises of water power by the State, and collecting fees therefor.

"Be it enacted by the People of the State of Oregon.

"Section 1. All water within the State from all sources of water supply belong to the public.

"Section 2. That every person, firm or corporation except municipal corporations (hereinafter call the appropriator), who shall appropriate water after the passage of this act, for the purpose of applying the same to the development of power, shall during the life of such appropriation as fixed herein pay to the State of Oregon not less than twenty-five cents or more than two dollars per annum in advance, on or before the second day of January of each year, for each and every horsepower represented by the said appropriation. The amount of the payment shall be determined by the Board of Control and adjusted from time to time, based upon the percentage of power appropriated which is put to beneficial use. For the purpose of this act, a horsepower is hereby defined to be 550 pounds of water per second of time for each foot of available fall.

"Section 3. The appropriator shall pay to the Board of Control the fees required by Section 2 of this act, proportionate to the remainder of the current year, and no appropriation of water for power purposes shall be deemed complete until such payment of fees is made. Immediately upon the receipt of such fees the Board of Control shall pay them over to the State Treasurer, taking his receipt therefor, who shall place the same in the general fund of the State Treasury. On or before the second day of January of each year thereafter, every appropriator of water for power purposes shall forward to the Board of Control the fees provided for in Section 2 of this act.

"Section 4. Upon the completion of the appropriation of water for power purposes, as now or hereafter provided by law, and compliance with the provisions of this act, the appropriator thereof shall own and enjoy all of the uses thereof so long as he pays the annual fees therefor, herein required, for a term not exceeding forty years from the date of appropriation, and shall have a preference right to reappropriate such water under such conditions as may be prescribed by law at the expiration of such term of years provided all fees have been paid. If any appropriator shall fail to pay any annual fee, or shall fail or refuse to renew the appropriation at its expiration, the State shall have a preference lien therefor prior to all other liens or claims, except for taxes, upon the improvements of the appropriation for developing and applying such appropriation of water and the real estate upon which the same are located, and upon notice from the Board of Control, the Attorney General shall proceed to foreclose the lien and collect any unpaid fees in the same manner as other liens or real property are foreclosed, and the water shall be again subject to appropriation.

"Section 5. Any person, firm or corporation who believes himself or itself injured in any material right by any decision of the Board of Control shall have the right of appeal from such decision to the circuit court for the county in which the proposed appropriation of water is situated.

"Section 6. In case the Board of Control is not created by law, with power to supervise the appropriation, distribution and use of the water of the State, then the duties imposed upon the Board of Control, as prescribed by this act, shall devolve upon and be assumed by the State Engineer.

"Filed in the office of the Secretary of State, February 24, 1909."

*(Laws of 1909, p. 370.)*

"An act providing for the payment of an annual license fee to the State by claimants to the use of water for power purposes where the water was applied to power generation, and the power generated prior to the 22d day of May, 1909, with suitable penalties for failure to pay the same, and providing the manner for collecting the same.

"Be it enacted by the People of the State of Oregon:

"Be it enacted by the Legislative Assembly of the State of Oregon:

"Section 1. Every person, firm, corporation or association hereinafter called 'claimant', claiming the right to the use of water for power development where said water was applied to the development or generation of power, and the power generated thereby prior to the 22nd day of May, 1909, shall on or before the 1st day of January, 1912, and on or before the 1st day of January of each year thereafter, pay to the State of Oregon in advance an annual license fee based upon the theoretical water horsepower claimed under each and every separate claim to water, graduated as follows, to-wit: Ten cents for each and every theoretical water horsepower up to 100, inclusive; five cents for each and every theoretical water horsepower in excess of 100 and up to and including 1,000; and one cent for each and every theoretical water horsepower in excess of 1,000; provided, however, upon filing the statement as hereinafter provided, the United States, or the State, or any municipal corporation, claiming the right to the use of water to any extent for the generation of power, or any other claimant to the right to use water for the generation of 25 theoretical water horsepower, or less, shall be exempted from the payment of all fees herein provided.

"Section 2. The fees herein provided shall be paid to the State Engineer in advance, and shall be accompanied by a written statement showing the extent of such claim. Said statement shall set forth the name and address of the claimant; the name of the stream from which the water is appropriated or claimed for power development; a description of the forty acres, or smallest legal subdivision in which the point of diversion and point of return are located; the date of the right as claimed; the maximum amount of water claimed expressed in cubic feet per second of time; the total average fall utilized under such claim; the manner of developing power, and the use to which the power is applied. If the regular flow is supplemented by water stored in a reservoir, the location of such reservoir, its capacity in acre-feet and the stream from which it is filled and fed, should be given, also the date of the right as claimed, for storage purposes.

"Should any claimant fail or neglect to file such statement within the time specified, or fail or neglect to pay such fees within the time specified, the fees due and payable shall be the amount specified in Section 1 of this act increased twenty-five per cent, and the State shall have a preference lien therefor, together with interest at the rate of ten per cent per annum from date of delinquency, upon the property of the claimant used, or necessaray for use, in the development of the right or claim, together with any improvements erected thereon for such development, and upon notice from the State Engineer, the Attorney General shall proceed to foreclose the lien and collect the amount due, as herein provided, in the same manner as other liens on real property are foreclosed.

"Section 3. The filing of a claim to water in excess of the amount to which the claimant is legally entitled shall not operate to vest in such claimant any right to the use of such excess water, nor shall the payment of the annual

license fees, provided for herein, operate to vest in any claimant any right to the use of such water beyond the amount to which claimant is legally entitled. The filing of any such claim to water shall be conclusive evidence as to the abandonment by the claimant of all rights to water for power purposes in excess of the claim as filed.

"Section 4. The amount of theoretical water horsepower upon which fees shall be paid under the provisions of this act shall be computed by multiplying the maximum amount of water claimed, expressed in cubic feet per second, by the average total fall utilized, expressed in feet, and dividing the product by 8.8.

"Filed in the office of the Secretary of State, February 23, 1911."

*(Laws of 1911, p. 418.)*

## OREGON LAW 1913

"An act fixing the time within which a water right may be lost by failure to use the water appropriated.

"Be it enacted by the People of the State of Oregon:

"Section 1. Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this State, and whenever hereafter the owner of a perfected and developed water right shall cease or fail to use the water appropriated, for a period of five successive years, the right to use shall thereupon cease, and such failure to use shall be conclusively presumed to be an abandonment of such water right, and thereafter the water which was the subject of use under such water right shall revert to the public and become again the subject of appropriation in the manner provided by law, subject to existing priorities; provided, that this act shall not apply to, or affect, the use of water, or rights of use, acquired by cities and towns in this State, by appropriation, or by purchase, for all reasonable and usual municipal purposes; and this act shall not be so construed as to impair any of the rights of such cities and towns to the use of water, whether acquired by appropriation or purchase, or heretofore recognized by act of the legislature, or which may hereafter be acquired; and the right of all cities and towns in this State to acquire rights to the use of the water of natural streams and lakes within the State, not otherwise appropriated, and subject to existing rights, for all reasonable and usual municipal purposes, and for such future reasonable and usual municipal purposes as may reasonably be anticipated by reason of growth of population, or to secure sufficient water supply in cases of emergency, is hereby expressly confirmed.

"Filed in the office of the Secretary of State, February 27, 1913."

*(Laws of 1913, p. 531.)*

WATER-SUPPLY PAPER 638-B, p. 35,
PUBLISHED BY THE UNITED STATE DEPARTMENT OF THE INTERIOR, 1932

# Water-Power Resources of the Rogue River Drainage Basin, Oregon

By Benjamin E. Jones, Warren Oakey, and Harold T. Stearns

## SUMMARY

The volcano whose crater is now occupied by Crater Lake, in southwestern Oregon, during its last active period poured forth volcanic ash that covered the country within a radius of about 25 miles. Rain and melting snow percolate easily into this light material, but after entering the ground the progress of the water is slow, and several months are required before it reaches the streams. Through the long dry season, therefore, run-off from the rains of the previous winter and spring is appearing in the creeks and rivers to maintain the flow, although there is no precipitation.

The Rogue River drains the western half of this area around Crater Lake. It rises at an altitude of about 5,000 feet and flows in a southwesterly direction for 210 miles to the Pacific Ocean. The drainage area is 5,080 square miles. The upper part of the basin is rough and wooded and has little tillable land. Its annual precipitation is 50 to 75 inches. This upper section furnishes practically all of the low-water flow of the river. The middle part of the basin constitutes the agricultural portion. Because of the low rainfall, 20 to 30 inches annually, and its seasonal distribution, very few crops can be raised without irrigation; yet when water is put on the land it is as productive as that in any other part of Oregon. Below the mouth of

the Applegate the river enters a more rugged region and flows in a fairly wide canyon containing little marketable timber and practically no tillable land except a few farms below Illahe.

The main tributaries of the Rogue River are the Applegate and Illinois Rivers. The Applegate River drains an agricultural area and during the summer is almost entirely used for irrigation. The Illinois River drains a mountainous area not far from the coast and is used to a slight extent for irrigation above Kerby; below that place it flows in a narrow canyon until it joins the Rogue River. The rainfall in the basin of the Illinois River amounts to about 68 inches, but there is a dry period from June to September, when the flow is very low, for the volcanic ash that acts as a reservoir on the upper Rogue River does not reach to the basin of the Illinois River.

Because of the character of its basin, the large and well-sustained flow, and the steep gradient, the Rogue River is well suited for use as a source of power. Field studies were made by the United States Geological Survey in 1923 and 1926 to determine the amount of power available and its relation to the public lands. Maps and profiles of the river have already been published, and a comprehensive scheme of development is outlined in this report. (See pls. 3 and 4 and Tables 1 and 2.) There are at present (1930) eight constructed power plants in the basin, of which four are on the main stream and four on tributaries. All these sites are capable of further development.

The principal plants are those at Prospect and Raygold, owned by the California-Oregon Power Co. A small plant at Gold Hill is used to pump water for the town. At Savage Rapids an irrigation company has erected a dam to raise the water level 20 feet for the double purpose of diverting water directly into a low-level canal for irriga-

tion and of supplying power to pump water to a high-level canal. The city of Ashland maintains a small municipal plant on Ashland Creek. The plants on Butte Creek and Mill Creek were erected to supply power to saw-mills, and one on Reuben Creek supplies a mine. The information concerning constructed plants in the Rogue River Basin is summarized in Table 1.

## REPORT OF
## THE STATE ENGINEER OF OREGON, 1930, P. 30
### Streams on Which Findings Have Been Entered

| Stream and County | Acreages | No. of Certificates Issued |
|---|---|---|
| Althouse Creek, Josephine | 749 | 18 |
| Anna Creek, Klamath | 8,273 | 29 |
| Bachart and Netter Creeks, Clackamas | 50 | 2 |
| Bridge Creek, Wheeler | 2,405 | ... |
| Buck Creek, Lake | 6,480 | 32 |
| Burnt River, Baker | 27,425 | 243 |
| Butter Creek, Umatilla | 7,712 | 62 |
| Chenoweth Creek, Wasco | 130 | ... |
| Cherry Creek, Klamath | 712 | 1 |
| Cherry Creek, Jefferson | 306 | 2 |
| Chewaucan River, Lake | 34,745 | 113 |
| Cochran Creek, Grant | 35 | 5 |
| Cottonwood Creek, Malheur | 173 | 4 |
| Cow Creek, Douglas | 1,345 | ... |
| Crooked River, Crook | 29,020 | 176 |
| Deschutes River, Deschutes | 119,499 | ... |
| Dugger Creek, Umatilla | 534 | 27 |
| East Branch Mud Creek, Umatilla | 532 | 17 |
| Fifteen Mile Creek, Wasco | 1,848 | 87 |
| Goodman Spring Branch, Umatilla | 202 | 6 |
| Goose Lake Streams, Lake | 78,142 | 104 |
| Grande Ronde River, Union | 34,516 | 470 |
| Helms Creek, Sherman | 2 | 1 |
| Hood River, Hood River | 26,836 | ... |
| Imnaha River, Wallowa | 9,043 | ... |
| John Day River, Grant and others | 49,696 | ... |
| Johnson Creek, Umatilla | 364 | 17 |
| Little Butte Creek, Jackson | 7,549 | ... |
| Lost River, Klamath | 5,988 | 38 |
| Malheur River, Malheur | 46,947 | 215 |

| Stream and County | Acreages | No. of Certificates Issued |
|---|---|---|
| Middle Branch Mud Creek, Umatilla | 472 | 28 |
| Mill Creek, Union | 2,235 | 83 |
| Mill Creek, Wasco | 401 | 51 |
| Mill Creek, Yamhill | 14 | 23 |
| Mosier Creek, Wasco | 206 | 35 |
| Neal Creek, Hood River | 159 | 16 |
| North Powder River, Baker and Union | 20,995 | 97 |
| Owyhee River, Malheur | 34,500 | 107 |
| Paulina Lake and Creek, Deschutes | 704 | 14 |
| Pine Creek, Umatilla | 2,385 | 37 |
| Pine Creek, Baker | 19,261 | ... |
| Powder River, Baker | 155,138 | 805 |
| Rogue River, Jackson and Josephine | 34,188 | ... |
| Silver Creek, Harney | 24,377 | ... |
| Silvies River, Harney | 87,566 | ... |
| Snow and Three Creeks, Deschutes | 1,321 | ... |
| Sprague River, Klamath | 11,572 | ... |
| South Branch Mud Creek, Umatilla | 445 | 15 |
| Squaw Creek, Deschutes | 16,480 | 56 |
| Sucker Creek, Josephine | 2,162 | 51 |
| Three Mile Creek, Wasco | 28 | 10 |
| Trout Creek, Jefferson | 3,470 | 41 |
| Tumalo Creek, Deschutes | 28,178 | 57 |
| Umatilla River, Umatilla | 74,732 | 167 |
| Walla Walla River, Umatilla | 7,401 | ... |
| Wallowa River, Wallowa | 38,680 | 261 |
| Warner Lakes, Lake | 50,280 | ... |
| West Prong Little Walla Walla River, Umatilla | 562 | 32 |
| White River, Wasco | 15,512 | 115 |
| Willow Creek, Morrow | 6,291 | 156 |
| Willow Creek, Malheur | 27,602 | 87 |
| Total | 1,156,999 | 4,013 |